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In the Supreme Court of the United States

OCTOBER TERM, 1999

RONALD A. GRAY, SPECIALIST FOUR
United States Army, Petitioner

v.

THE UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

PETITION FOR A WRIT OF CERTIORARI

THOMAS H. DUNN
Florida Bar No. 871753
303 Elizabeth Street, N.E.
Atlanta, GA 30307
(404) 222-9202
Counsel of Record

BLAIR T. O'CONNOR
Captain, Judge Advocate
General Corps (JA)
U.S. Army Legal Services Agency
Defense Appellate Division
901 N. Stuart Street, Suite 340
Arlington, VA 22203
(703) 588-7952

ADELE H. ODEGARD
Colonel, JA
Chief, Defense Appellate Division

ATTORNEYS FOR PETITIONER

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CAPITAL CASE

QUESTION PRESENTED

I. During peacetime, do the Fifth, Sixth and Eighth Amendments permit a member of the Armed Forces to be convicted and sentenced to death by a court-martial panel of less than twelve members when there is no fixed panel size?

II. During peacetime, does the convening authority's power to hand-pick military subordinates, whose careers he can directly and immediately effect and control to serve as court members in a capital court-martial, violate the Fifth, Sixth, and Eighth Amendments?

III. Can an appellate court *assume* that the trial judge made a determination as to whether the prosecutor's explanation was credible or pretextual pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986), without conducting a further hearing on the issue, when the trial judge ruled on petitioner's *Batson* claim before the prosecutor provided a race-neutral explanation for the challenge?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

PETITION FOR A WRIT OF CERTIORARI

The petitioner, Specialist Four Ronald A. Gray, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Armed Forces in this case.

CITATION TO THE OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces is reported as *United States v. Gray*, 51 M.J. 1 (1999) and is attached as Appendix A. The decisions of the United States Army Court of Military Review are reported as *United States v. Gray*, 37 M.J. 730 (A.C.M.R. 1992) and *United States v. Gray*, 37 M.J. 751 (A.C.M.R. 1993) and are attached as Appendices B and C. The order of the United States Court of Appeals for the Armed Forces granting Petitioner's Motion for Leave to File Second Petition for Reconsideration and denying the Petition is attached as Appendix D. The order denying petitioner's motion for reconsideration is attached as Appendix E.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on May 28, 1999. Rehearing on Petitioner's second motion for reconsideration was denied on June 26, 2000. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1259(1), the United States Court of Appeals for the Armed Forces having reviewed this case pursuant to Uniform Code of Military Justice Article 67(a)(1), 10 U.S.C. § 867(a)(1) [hereinafter U.C.M.J.].

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves:

1. The Fifth Amendment to the United States Constitution, which provides in pertinent part: "No person shall be . . . deprived of life, liberty, or property, without due process of law."

2. The Sixth Amendment to the United States Constitution, which provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."

3. The Eighth Amendment to the United States Constitution, which forbids the infliction of "cruel and unusual punishments."

4. Article 16(1)(A), U.C.M.J., 10 U.S.C. § 816(1)(A), which provides that a general court-martial may consist of "a military judge and not less than five members."

5. Article 25(d)(2), U.C.M.J., 10 U.S.C. § 825(d)(2), which provides in pertinent part: "[w]hen convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament."

STATEMENT OF THE CASE

Specialist Four Ronald Gray, an African-American from Miami, Florida, enlisted in the United States Army in 1983. He was serving with the 82d Airborne Division at Fort Bragg, North Carolina, at the time of the offenses and court-martial. During December, 1987 and the first four months of 1988, he was tried by a general court-martial composed of six members convened by the Commanding General of the 82d Airborne Division. Specialist Gray was found guilty of premeditated murder (two specifications) and attempted premeditated murder, in violation of U.C.M.J., articles 118(1) and 80, 10 U.S.C. §§ 918(1) and 880, respectively. He was also found guilty of rape (three specifications), robbery (two specifications), and forcible sodomy (two specifications), in violation of U.C.M.J., articles 120, 122 and 125, 10 U.S.C. §§ 920, 922 and 925, respectively. The three female victims in this case were all Caucasian. On April 12, 1988, Specialist Gray was sentenced to death, a dishonorable discharge, forfeiture of all pay and allowances and reduction to Private E-1. On July 29, 1988, the Commanding General of the 82d Airborne Division approved the sentence.

On September 15, 1989, counsel for Petitioner filed initial pleadings with the United States Army Court of Criminal Appeals (formerly the United States Army Court of Military Review). The Court of Criminal Appeals ordered a sanity board, which found that Petitioner was mentally responsible at the time of the offenses and that he was mentally competent to understand his trial and the present appellate proceedings. Petitioner's convictions and sentence were subsequently affirmed by the United States Army Court of Criminal Appeals. *United States v. Gray*, 37 M.J. 730 (A.C.M.R. 1992). The Army court denied a timely filed petition for reconsideration, but considered supplemental assignments of error. *United States v. Gray*, 37 M.J. 751 (A.C.M.R. 1993). The United States Court of Appeals for the Armed Forces affirmed the Army court's decision on May 28, 1999. On April 6, 2000, the Court of Appeals denied a petition for reconsideration. Petitioner filed a timely Motion for

Leave to File a Second Petition for Reconsideration and a Second Petition for Reconsideration in accordance with the Court of Appeals rules. On June 26, 2000, the Court of Appeals granted Petitioner leave to file the Second Petition for Reconsideration and denied the Second Petition. Petitioner now files this timely Petition for a Writ of Certiorari.

HOW THE QUESTIONS PRESENTED WERE RAISED AND DECIDED BELOW

At trial, the military judge granted prosecution challenges for cause against two detailed African-American enlisted court members because of their opposition to the death penalty. The prosecution then exercised its sole peremptory challenge against one of the two remaining African-American court members. The trial defense counsel objected to the challenge and demanded an explanation, on the record, for the prosecution's biased peremptory challenge, citing *Batson v. Kentucky*, 476 U.S. 79 (1986). (R. at 762). The military judge ruled on petitioner's *Batson* claim after the prosecutor denied that his peremptory challenge of the African-American court member was based on discriminatory intent, but before the prosecutor provided a race neutral explanation for the challenge. After challenges, the court-martial panel consisted of only six members—all male and one African-American.

Trial defense counsel then moved to require a twelve-member panel, "the number that is utilized in all civilian courts in capital cases." (R. at 768). Trial defense counsel also objected to the fact that the lack of a fixed number of members violated the Eighth Amendment as being arbitrary under *Furman v. Georgia*, 408 U.S. 238 (1972). The military judge denied the motion, stating that while Congress may amend the law in the future, or the Supreme Court may find that the Constitution affords capital defendants twelve-member court-martial panels, the law as it existed at the time required a minimum of five members. (R. at 769). Since the petitioner's panel had six members, the military judge

ruled that he was not entitled to any additional members. *Id.* On appeal, the Petitioner contended that he was denied due process of law in violation of the Fifth, Sixth, and Eighth Amendments and Article 55, U.C.M.J., 10 U.S.C. § 855, because he was tried in a peacetime capital case by a court-martial composed of less than twelve members. The Court of Appeals for the Armed Forces denied relief on this claim, stating that "[a] majority of this Court has consistently rejected this argument as a matter of constitutional law." *United States v. Gray*, 51 M.J. 1, 49 (1999) (citing *United States v. Loving*, 41 M.J. 213, 287 (1994); *United States v. Curtis*, 32 M.J. 252, 267-68 (C.M.A. 1991).

Petitioner also raised on appeal the constitutionality of U.C.M.J., Article 25, 10 U.S.C. § 825, which gives the convening authority the power to hand-pick subordinates as court members. The Court of Appeals "again reject[ed this] argument[]." *United States v. Gray*, 51 M.J. 1, 60 (1999) (citing *United States v. Loving*, 41 M.J. 213, 297 (1994)).

Petitioner raised on appeal the military judge's denial of his *Batson* objection to the prosecutor's use of a peremptory challenge of an African-American member. The Court of Appeals, by a 3-2 opinion, upheld the Army Court of Military Review's affirmance of the military judge's ruling. *United States v. Gray*, 51 M.J. 1, 35 (1999).

REASONS THE WRIT SHOULD BE GRANTED

This case raises substantial questions concerning the scope of constitutional rights of members of the Armed Forces facing court-martial for capital murder during peacetime. The questions present significant and important systemic issues concerning the size, manner of selection, and fundamental fairness and impartiality of court-martial panels in capital cases under the Uniform Code of Military Justice. The presentation of these systemic issues makes this a case of first impression warranting the invocation of this Court's certiorari jurisdiction.

I

DURING PEACETIME, ALLOWING A MEMBER OF THE ARMED FORCES TO BE SENTENCED TO DEATH BY A COURT-MARTIAL PANEL OF LESS THAN TWELVE, WHEN THERE IS NO FIXED PANEL SIZE, PROMOTES UNRELIABILITY, UNDERMINES THE RIGHT TO AN IMPARTIAL FACTFINDER AND CAPITAL SENTENCER, AND CREATES AN ARBITRARY FACTOR IN THE ADMINISTRATION OF THE DEATH PENALTY UNDER THE UNIFORM CODE OF MILITARY JUSTICE, IN VIOLATION OF THE FIFTH, SIXTH AND EIGHTH AMENDMENTS

A. Fewer Than Twelve Member Panels in Capital Cases

Ronald Gray stands convicted and sentenced to death by the fewest number of lay members of any death row inmate in the United States. While capital defendants in twenty-nine states and the federal government have their sentences determined by a twelve-member jury[1], Petitioner Gray was sentenced to death by a panel consisting of a mere six members. The sole reason for the alarming disparity in the size of his panel as compared with other capital juries is his status as a member of this country's Armed Forces.

Four justices of this Court have expressed the opinion that "when the punishment may be death, there are particular reasons to ensure that the men and women of the Armed Forces do not by reason of serving their country receive less protection than the Constitution provides for civilians." *Loving v. United States*, 517 U.S. 748, 774 (1996) (Stevens, J., concurring).[2] Petitioner's case puts this principle squarely to test.

Petitioner, by virtue of his decision to serve his country in the Armed Forces, received less protection than any civilian

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[1] *See* Dwight H. Sullivan, *Playing the Numbers: Court-Martial Panel Size and the Military Death Penalty*, 158 MIL. L. REV. 1, 1-3, nn.3-4 (1998).

[2] Joining in Justice Stevens' concurring opinion were Justices Souter, Ginsburg and Breyer.

facing a capital charge would have received in state or federal court. The court-martial panel that convicted Specialist Gray and sentenced him to death numbered one-half the size of the jury he would have received had he remained a civilian. In consideration of the fact that it only takes a single vote to save an accused from the death penalty, the difference between twelve votes and six votes simply cannot be underestimated, nor tolerated under the Constitution.

This Court has held that the Sixth Amendment guarantees to all civilians the right to a trial by jury of no less than six members in any criminal case. *See Ballew v. Georgia*, 435 U.S. 223, 245 (1978); *Burch v. Louisiana*, 441 U.S. 130, 139 (1979) (holding that nonunanimous verdicts by six-member juries in criminal cases violate the 6th Amendment). Although this Court has found that courts-martial are not subject to the jury trial requirements of the Sixth Amendment, it has never done so in the context of a capital case during peacetime. *Ex parte Quirin*, 317 U.S. 1, 39-43 (1942); *Reid v. Covert*, 354 U.S. 1, 37 n.68 (1957) (plurality opinion); *O'Callahan v. Parker*, 395 U.S. 258, 261 (1969). Furthermore, this Court is yet to consider the constitutionality of fewer than twelve lay members sentencing a defendant to death, primarily because neither the federal government nor any state in this country has adopted such a system.[3]

Pursuant to Articles 16(1)(A) and 18, U.C.M.J., 10 U.S.C. § § 816(l)(A) and 818, a general court-martial may consist of as few as five members and may "adjudge any punishment . . . including the penalty of death." Thus, while a court-

[3] Of the thirty-eight states that have the death penalty, twenty-nine of them delegate the sentencing decision to a twelve-person jury and require unanimous consent. Sullivan, *supra*, at 2 n.3. The federal government also utilizes twelve person juries in determining sentences in capital cases. *Id.* In the remaining nine states, the decision to impose death is delegated to the trial judge, with four of these states allowing for an advisory recommendation from the jury as to an appropriate sentence. *Id.* at 3 n.4.

martial panel of five members can sentence a service member to his or her death, a civilian jury of five members is prohibited from adjudging sentences which exceed the limits of petty punishments. See *Ballew*, 435 U.S. at 245; *Baldwin v. New York*, 399 U.S. 66 (1970) (plurality opinion) (holding that the constitutional right to a jury trial attaches to cases in which confinement for more than six months is an authorized punishment). Therefore, when it comes to death as a punishment, it is apparent that the men and women of the Armed Forces, by virtue of serving their country, receive less protection than the Constitution provides to civilians.

This Court has recognized that, due to the qualitative difference in a sentence to death, there is a heightened "need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion). The C.A.A.F. has applied this heightened standard of reliability to capital courts-martial. *United States v. Loving*, 41 M.J. 213, 278 (1994), *aff'd on other grounds*, 517 U.S. 748 (1996). The military's continued use of fewer than twelve-member panels in capital cases, however, violates this heightened reliability requirement because, as this Court has previously noted, six-member panels are statistically less reliable than twelve-member ones. *Ballew*, 435 U.S. at 232 ("[R]ecent empirical data suggest that progressively smaller juries are less likely to foster effective group deliberation. At some point, this decline leads to inaccurate factfinding and incorrect application of the common sense of the community to the facts.").

This Court has previously acknowledged the value of twelve-member juries in cases where the punishment may be death. *See Williams v. Florida*, 399 U.S. 78, 103 (1970) ("In capital cases . . . it appears that no State provides for less than 12 jurors—a fact that suggests implicit recognition of the value of the larger body as a means of legitimating society's decision to impose the death penalty."). Nevertheless, despite the fact that twenty-nine states and

the federal government place the sentencing authority in capital cases in the hands of a twelve-member jury, the military continues to stand alone as the only capital jurisdiction in the country that allows fewer than twelve lay members to sentence a person to death. Moreover, the only capital defendants in this country who do not have the right to have their guilt or innocence determined by a twelve-member jury are those tried by the military. Therefore, petitioner's case directly confronts the principle announced by four members of this Court that "when the punishment may be death ... the men and women of the Armed Forces [should] not by reason of serving their country receive less protection than the Constitution provides for civilians." *Loving*, 510 U.S. at 774 (Stevens, J., concurring).

B. The Effects of a Variable Panel Size in Capital Courts-Martial

Far more disturbing than the lack of a twelve-member guarantee in capital courts-martial, however, is the lack of a fixed number of members who make the ultimate decision between life and death. While a general court-martial cannot consist of less than five members, there is no maximum number of members that can hear a case. Article 16(1)(A), U.C.M.J., 10 U.S.C. § 816(1)(A). Therefore, the size of court-martial panels in capital trials varies from one case to the next.[4] In consideration of the fact that a sentence to death requires a unanimous verdict, this variability in the panel size will almost invariably operate to the prejudice of the accused.

Every time a panel member is removed from the court-martial, either through a challenge for cause or by either

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[4] Marine Lance Corporal Wade Walker was sentenced to death by a ten-member panel; Army Private Dwight Loving and Marine Lance Corporal Kenneth Parker were sentenced to death by eight-member panels; and Petitioner was sentenced to death by a six-member panel. Army Sergeant William Kreutzer and Marine Sergeant Jesse Quintanilla, the remaining two servicemembers on military death row, were both sentenced by twelve-member panels. *See* Sullivan, *supra*, at 4 n.5.

side's peremptory challenge, the number of votes needed by the government to secure a death sentence is also reduced. Therefore, because each successful challenge of a member by the defense makes the government's job correspondingly easier, a servicemember accused of a capital offense has little to no incentive of either engaging in *voir dire* or exercising challenges.

The dilemma for capital accuseds caused by a variable number of panel members in capital cases was commented upon by one of the judges of the Air Force Court of Criminal Appeals in the case of *United States v. Simoy*, 46 M.J. 592, 623-28 (A.F. Ct.Crim. App. 1996) (Morgan, J., concurring), *rev'd on other grounds*, 50 M.J. 1 (1998). Judge Morgan wrote:

> Little mathematical sophistication is required to appreciate the profound impact in this case of reducing the court-martial panel size. . . . Simple arithmetic tells us that the chances of finding . . . a person [who would vote against the death penalty] improve linearly with each additional individual placed into a pool. Each challenge of an individual "spots" the prosecution a vote, and becomes, in essence, a vote for death. Instead of having to convince 13 people that appellant deserved death in three different votes, the government only had to convince 8, a considerably simplified task.

Id. at 625-26.

Judge Morgan noted that, because the jury size is fixed at twelve in civilian capital cases, "those members challenged off *are replaced*. A defendant considering challenging a juror can be assured that the decision to do so will not correspondingly reduce the size of his jury." *Simoy*, 46 M.J. at 627 (emphasis in original). The fundamental problem with the military justice system, however, is that successfully challenged members are rarely replaced. *Id.* at 627. Therefore, it is practically never to his advantage to conduct *voir dire* or to exercise challenges against the members. "[W]here there is no replacement standing by, if there is even

a 1 percent chance that a given individual will vote for life, there is everything (literally) to gain and nothing to lose by retaining that person on the court." *Id.* at 626.

Judge Morgan based his conclusions in *Simoy* in large part on this Court's seeming acceptance of "certain statistical conclusions strengthening the playing card analogy." *Simoy*, 46 M.J. at 626 (citing *Ballew*, 435 U.S. at 234). One statistic in particular greatly disturbed Judge Morgan, and underscores the problems with capital sentencing by a variable-sized panel of fewer than twelve members:

> Remarkably, a minority viewpoint held by 10 percent of the population (such as a strong moral aversion to the death penalty, perhaps?) has only a 28.2 percent chance of going unrepresented in a 12-member jury, but more than half of 6-members juries could be expected to have no representative of that view at all. The studies point ineluctably to one conclusion: for defendants in criminal cases, particularly capital trials, so long as unanimity is required, more is always better.

Id. at 627 (citing *Ballew*, 435 U.S. at 234-36).

The lack of a fixed number of panel members in capital courts-martial thus places a capital accused in an impossible situation. On the one hand, the benefits of maximizing the panel's size dictate that he not engage in any *voir dire* (other than to rehabilitate those members who appear vulnerable to challenge) and obviously not exercise challenges against any of the members. Completely forfeiting his right to *voir dire* and challenge the members, however, will only result in member biases against the accused going undetected, with the disturbing result of such members remaining on the panel. Obviously, any system of justice that places a capital accused in such an impossible "damned if you do, damned if you don't" situation is a system that is broken, and in serious need of repair.

The lack of a fixed number of panel members in capital courts-martial therefore creates a *voir dire* scenario whereby one side (the defense) is attempting to maximize the size of the panel while the other side (the government) is attempting to reduce the panel size to the minimum number of five members. The implications for the accused in this scenario can be severe:

> The rules governing capital court-martial panel size thus promote the spectacle of a panel vetted and groomed by the government but not the defense. Providing the government with an incentive to voir dire members and exercise challenges while discouraging the defense from doing so is particularly perverse in court-martial practice, as the convening authority's power to select members gives the government "the functional equivalent of an unlimited number of peremptory challenges." A system that encourages the defense counsel in a capital case to imitate a potted plant is constitutionally suspect.

Sullivan, *supra*, at 37 (quoting *United States v. Carter*, 25 M.J. 471, 478 (C.M.A. 1988) (Cox, J., concurring)). The constitutional rights that the lack of a fixed number of panel members in capital courts-martial violates include the right to due process under the Fifth Amendment and the right to be free from cruel and unusual punishment under the Eighth Amendment.

1. The Fifth Amendment Due Process Clause

This Court has recognized that an accused has a due process right to a fair and impartial factfinder. *See Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1075 (1991); *Irwin v. Dowd*, 366 U.S. 717, 722 (1961) (holding that denial of the right to a trial before "a panel of impartial, 'indifferent jurors . . . violates even the minimal standards of due process."). A vital aspect of the right to a fair and impartial jury is the ability to engage in meaningful *voir dire*. *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 554 (1984); *see also Morford v. United States*, 339 U.S. 258, 259 (1950) (per curiam)

(recognizing *voir dire* as the "guarantee of a defendant's right to an impartial jury.").

While the military does not prevent defendants from engaging in *voir dire* or exercising challenges in capital cases, the enormous price it exacts for exercising these options acts as the functional equivalent of such a prohibition. Imposing such high costs on a defendant's right to ensure an impartial factfinder violates the doctrine of unconstitutional conditions, which recognizes "rights of constitutional stature whose exercise a state may not condition by the exaction of a price." *Garrity v. New Jersey*, 385 U.S. 494, 500 (1967); see also *United States v Jackson*, 390 U.S. 570, 572 (1968) ("Whatever might be said of Congress' objectives, they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights.") *Id.* (citations omitted).

The chilling effect that a variable panel size has on a capital accused's use of *voir dire* and challenges is both unnecessary and excessive. Either Congress or the President could have easily established a death penalty system for the military where members who are challenged off are replaced. They need only have looked at any one of the death penalty statutes in the twenty-nine states that provide for jury sentencing, or at the provisions for capital sentencing in United States District Courts, to assist in ensuring that members of the Armed Forces are afforded the same rights as civilians in capital cases. The failure to adopt such a system in the military has thereby created an unconstitutional condition on the exercise of a fundamental right.

Discouraging a defendant from engaging in *voir dire* and exercising challenges in capital cases challenges this Court's holding that Congress "is subject to the requirements of the Due Process Clause when legislating in the area of military affairs." *Weiss v. United States*, 510 U.S. 163, 176 (1994). If a system that punishes a capital accused for utilizing the tools necessary to guarantee his fundamental right to a fair and impartial panel does not offend due process, it is difficult to imagine what would. Accordingly, whatever "measure of

protection" the Due Process Clause affords "defendants in military proceedings," it is surely sufficient to invalidate the variable size of capital courts-martial. *Id.*

2. The Eighth Amendment's Right to Be Free from Cruel and Unusual Punishments

This Court has previously "assumed that *Furman* [*v. Georgia*, 408 U.S. 238 (1972)] and the case law resulting from it are applicable" to capital courts-martial. *See Loving*, 517 U.S. at 755; *but see Loving*, 517 U.S. at 777 (Thomas, J., concurring in the judgment). Furthermore, the C.A.A.F. has held that servicemembers are entitled to protection against cruel and unusual punishments both by statute and the Eighth Amendment. *United States v. Matthews*, 16 M.J. 354, 368 (C.M.A. 1983). The C.A.A.F. has further held that in enacting Article 55, U.C.M.J., "Congress 'intended to grant protection covering even wider limits' than 'that afforded by the Eighth Amendment. '" *Id.* (quoting *United States v. Wappler*, 2 U.S.C.M.A. 393, 396, 9 C.M.R. 23, 26 (1953)).

One aspect of the protection against cruel and unusual punishments is the "heightened need for reliability in capital punishment cases," a protection that the C.A.A.F. has specifically held applies to capital courts-martial. *United States v. Loving*, 41 M.J. 213, 278 (1994) (citing *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion)), *aff'd on other grounds* 517 U.S. 748 (1996). Since its decision in *Furman v. Georgia*, 408 U.S. 238 (1972), this Court has consistently held that "death as a punishment is unique in its severity and irrevocability. When a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed." *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (opinion of Stewart, Powell, & Stevens) (citations omitted).

A death penalty system that deters *voir dire* and the exercise of challenges by one party, while encouraging the vigorous use of these tools by the other, violates the heightened reliability requirement of the Eighth Amendment. While biases against the government are likely to be

discovered during *voir dire*, and members possessing such biases removed, biases against the accused are likely to go uncovered, thereby allowing such members to remain on the panel. The inevitable result of such a system is a panel that is drastically biased either in favor of the government or against the defense, or both. Such an extreme departure from the adversarial system's norms substantially diminishes the reliability of all capital courts-martial.

A corollary to the heightened reliability requirement of the Eighth Amendment is the protection against the arbitrary imposition of a sentence to death. *See McCleskey v. Kemp*, 481 U.S. 213, 278 (1987); *Woodson*, 428 U.S. at 303; *Gregg*, 428 U.S. at 188-89. The lack of a fixed number of panel members in military capital cases injects an entirely arbitrary factor into the death penalty equation: the number of members needed to sentence a servicemember to death. The fact that the sheer randomness of this number can mean life or death from one capital accused to the next painfully illustrates the wanton and arbitrary nature of the military death penalty system.

The arbitrary and capricious nature that the variable panel size has on the imposition of the death penalty in capital courts-martial can be illustrated by two hypothetical capital cases arising from the same murder:

> The commanding general of one accused convenes a court-martial with twenty members; the commanding general of another convenes a court-martial with only ten members. While no legal principle justifies treating the two accused differently, one has a far greater statistical chance of obtaining the single vote necessary to preclude a death sentence. Such an irrelevant factor determining who lives and who dies is precisely the sort of arbitrariness that the Supreme Court has condemned.

Sullivan, *supra*, at 43.

A review of convening authorities' actual practice in appointing panel members to capital cases reveals that the process has indeed been arbitrary. The last eight

servicemembers sentenced to death began their trials with panels ranging in size from nine to twenty members.[5] Because convening authorities have no guidance concerning how many members to appoint in capital cases, such randomness in the number of members that are initially appointed, and who ultimately sit, on capital courts-martial can be expected to continue.[6]

This Court should grant review in Petitioner's case to determine the extent to which the military justice system will be allowed to depart from universally accepted death penalty standards. By donning a military uniform, does a U.S. citizen shed the most important Constitutional protections he or she previously held? Or will the military instead be made to follow the guidance of its first Commander-in-Chief, who maintained that " [W]hen we assumed the soldier, we did not lay aside the citizen"?[7]

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[5] *See* Sullivan, *supra*, at 43 n. 199; *Simoy*, 46 M.J. at 624.

[6] In fact, it has been suggested that the military justice system may even prevent conscientious convening authorities from guaranteeing the protection of a twelve-member panel in capital cases.

> In *United States v. Parker*, eight members remained following voir dire and challenges. The convening authority agreed to a defense request to appoint additional members to ensure that twelve members would ultimately hear the case. The military judge, however, refused to allow the appointment of additional members, ruling that R.C.M. 505(c)(2)(B) "prohibits the addition of new members after assembly unless the court is below quorum. Quorum is five. Such a procedure by the convening authority would be improper and in violation of the [M]anual [for CourtsMartial]. I cannot permit it, or I would risk reversal.

Sullivan, *supra*, at 25 n. 111 (citations omitted).

[7] THE WRITINGS OF GEORGE WASHINGTON 13 (Jared Sparks ed., 1834)(from George Washington, Answer to an Address of the New York Provincial Congress, June 26, 1775).

II.

IN A CAPITAL COURT-MARTIAL DURING PEACETIME, THE CONVENING AUTHORITY'S POWER TO [illegible]ND PICK MILITARY SUBORDINATES—WHOSE CAREERS HE CAN DIRECTLY AND IMMEDIATELY AFFECT AND CONTROL—TO SERVE AS COURT MEMBERS VIOLATES THE FIFTH AND EIGHTH AMENDMENTS.

> A district attorney is vested with prosecutorial discretion. What if he picked the jury from among those who work directly for him? The governor wields the power of clemency. What if she picked the jury? The grand jury, guided by the prosecutor and cloaked in secrecy, formally investigates criminal allegations. What if they chose the membership of each petit jury? The military commanding officer is apprised of suspected misconduct within his unit. He stays informed and may properly influence the course of ongoing criminal investigations. He decides whether, who, and on what charges to prosecute. Ultimately, he determines the propriety of all convictions and sentences. He is the district attorney, the governor and the grand jury rolled into one. In the exercise of justice, he is as close to a true sovereign as this nation has, and he picks the jury from among those who work for him.[8]

Petitioner was convicted of capital murder and sentenced to death by a court-martial composed of six members who were hand-picked by the convening authority. The court members were subordinates of the convening authority and the convening authority had the power to directly and immediately affect and control the court members' military

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[8] Major Guy P. Glazier, *He Called for His Pipe, and He Called for His Bowl, and He Called for His Members Three—Selection of Military Juries by the Sovereign: Impediment of Military Justice*, 157 MIL. L. REV.1, 2 (1998).

careers. The convening authority's ability to exercise subjective judgment on who should serve on a capital court-martial, coupled with the fact that the convening authority is the commanding officer of the selected members, is "without any parallel in civilian justice systems." *United States v. Loving*, 41 M.J. 213, 320 (1994) (Wiss, J., dissenting). During peacetime, the convening authority's power to hand-pick military subordinates—whose careers he can directly and immediately affect and control—to serve as members on a court-martial empowered to sentence a member of the Armed Forces to death violates the Fifth and Eighth Amendments.

Three relevant constitutional principles delimit this issue. First, the Eighth Amendment imposes a heightened standard for "reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). Second, because the Eighth Amendment requires consideration of the "evolving standards of decency," *see Trop v. Dulles*, 356 U.S. 86, 100 (1958), this Court has consistently acknowledged and executed its obligatory task of "examine[ing] capital sentencing procedures against evolving standards of procedural fairness in a civilized society." *Gardner v. Florida*, 430 U.S. 349, 357 (1977). Finally, the Fifth Amendment procedural due process analysis, much like the Eighth Amendment "evolving standards of decency" inquiry, takes into consideration whether a criminal process "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Herrera v. Collins*, 506 U.S. 390, 407 (1993) (quoting *Medina v. California*, 505 U.S. 437, 445-46 (1992) and *Patterson v. New York*, 432 U.S. 197, 202 (1977)).

Under the Uniform Code of Military Justice, the commanding officer (convening authority) "convenes" a court-marital, *see* articles 22-24, U.C.M.J., 10 U.S.C. §§ 822-824, and refers charges to it for trial, *see* articles 30, 32-35, U.C.M.J., 10 U.S.C. §§ 830, 832-835. The process of convening a court-martial includes selecting the court members

(jury) according to criteria set forth in article 25, U.C.M.J., 10 U.S.C. § 825. Article 25(d)(2), U.C.M.J. provides that "when convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." The subjective criteria set forth in Article 25(d)(2) give the convening authority unfettered discretion in appointing members to a court-martial panel. The convening authority's power to select members "is the most vulnerable aspect of the court-martial system." *United States v. Smith*, 27 M.J. 242, 252 (C.M.A. 1988) (Cox, J., concurring). Personal appointment of the members by the convening authority is also "[a]rguably the most critical and least necessary vestige of the historical origins of the military justice system." Colonel Francis A. Gilligan and Professor Fredric I. Lederer, COURT-MARTIAL PROCEDURE § 15-31.00 (1991).

This system for selecting court members set forth in Article 25 is especially susceptible to arbitrary influence in a court-martial empowered to sentence a service-member to death because of the inherent peril of command influence. *See* article 37, U.C.M.J., 10 U.S.C. § 837 (unlawful command influence in the action of a court is prohibited). Command influence is a term of art in the military, but generally implies a commander's improper influence based on rank and position of authority (either intentionally or unintentionally) on the decisions of court-martial members. It is an innate problem because all panel members are selected—and supervised in their military careers—by the general court-martial convening authority, *see* article 25(d)(2), U.C.M.J., 10 U.S.C. § 825(d)(2), who is typically the base or post commander and a general officer.

The unfairness of this in the context of a capital case is apparent. The convening authority makes the prosecutorial determination that an accused shall be tried by a general court-martial. See article 22, U.C.M.J, 10 U.S.C. § 822. He makes the determination that the case will proceed to a court-martial as a death penalty eligible case. The convening

authority hand-picks the members of his command who will serve on the court martial panel. *See* article 25, U.C.M.J., 10 U.S.C. § 825. He must approve any resulting death sentence. *See* article 60, U.C.M.J., 10 U.S.C. § 860.

Thus, a capital defendant in the Armed Forces, like Petitioner, goes on trial for his life before court members who are hand-picked by their commanding officer. The members are aware that the commanding officer has already determined that it is appropriate that the government should seek the death penalty. The members know that they must later answer to the commanding officer in their career development. *See* Hearings on S. 857 and H.R. 4080, 81st Cong., 1st Sess. (1949*) reprinted in* Index and Legislative History of the Uniform Code of Military Justice, at 78-85 (1950) (Testimony of George Speigelberg for the Special Committee on Military Justice, American Bar Association). This unparalleled system for selecting court members for a capital court-martial during peacetime is an intrinsic obstacle to obtaining a fair and impartial panel and trial in capital courts-martial in the Armed Forces.

This Court recently emphasized that the military justice system's history strongly influences what process is due under the Constitution. *Weiss v. United States*, 510 U. S. 163, 179 (1994). "Although American courts-martial from their inception have had the power to decree capital punishment, they have not long had the authority to try and to sentence members of the Armed Forces for capital murder committed in the United States in peacetime." *Loving v. United States*, 517 U.S. 748, 753 (1996). It was not until 1950, with the passage of the Uniform Code of Military Justice, that Congress first authorized courts-martial to impose a sentence of death against a member of the Armed Forces for murder committed during peacetime. *See* Article 118, U.C.M.J., 10 U.S.C. § 918. Thus, for the first time in the history of this nation's military justice system, the U.C.M.J. gave convening authorities the unprecedented and unparalleled power to hand-pick members of a court-martial who were to decide whether a member of the Armed Forces should live or die for a murder committed during peacetime. Any historical defense of the convening authority's ability to hand-pick

members for a court-martial during peacetime must be limited to non-capital cases.

Recent concerns over the power of a convening authority to select court members have been raised by Congress and by the courts in Canada and Europe, where similar provisions in the Canadian and British military justice systems have come under attack. These developments support Petitioner's request that this Court grant review of this unprecedented and unparalleled power of a convening authority to hand-pick court members in a capital court-martial during peacetime.

Congress has shown a renewed interest in the court member selection process. In the Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Congress ordered the Secretary of Defense to submit alternatives to the current method for selecting members of the Armed Forces to serve on courts-martial. The only alternative selection method mentioned by Congress was a random selection method divesting the convening authority of any power to personally select court members.

In 1992, the Supreme Court of Canada found that Canada's military justice system, which allowed the selection of court-martial members by the convening authority, violated the 1982 Canadian Charter of Rights and Freedoms' guarantee that an accused is "presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal." *Genereux v. The Queen*, [1992] S.C.R. 259. The Canadian Supreme Court found that the military's court member selection procedure violated the "independence" prong of this guarantee.[9]

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[9] It is unacceptable that an external force be in a position to interfere in matters that are directly and immediately relevant to the adjudicative function, for example.... sitting of the court and court lists. Although there must of necessity be some institutional relations between the judiciary and executive, such relations must not interfere with the judiciary's liberty in adjudicating individual disputes and in upholding the law and values of the Constitution.

Id. at 286.

The Court stressed that the lack of tribunal independence, real or perceived, violates the Charter. The Canadian Supreme Court concluded that a reasonable person, familiar with the constitution and structure of the General Court Martial, would conclude that the tribunal did not enjoy the necessary judicial independence.

In February 1997, the European Court of Human Rights ruled that the British court-martial member selection system violated the European Convention for the Protection of Human Rights and Fundamental Freedoms. Similar to Article 25, U.C.M.J., the British system authorized the convening authority to prefer charges, specify the type court-martial and personally select the court members. The European Court of Human Rights held that the court member selection method violated Article 6(1) of the Human Rights Convention, which guarantees a fair trial before "an independent and impartial tribunal established by law." *Findlay v. United Kingdom*, 24 Eur. Ct.H.R. 221, ¶68 (1997).[10]

Canada, Great Britain, and the European Community all agree that court member selection by the convening authority fails to meet minimum standards of independence and impartiality in practice and appearance. The United

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[10] The Court held that:

> in order to maintain confidence in the independence and impartiality of the court, appearance may be of importance. Since all members of the court-martial which decided Mr. Findlay's case were subordinate in rank to the convening officer and fell within his chain of command, Mr. Findlay's doubts about the tribunal's independence and impartiality could be objectively justified.

Id. at ¶ 68. The European Court of Human Rights concluded that in light of "the central role played by the convening officer in the organization of the court-martial, . . . [Mr. Findlay's] misgivings about the independence and impartiality of the tribunal which dealt with his case were objectively reasonable. . . . [T]here has been a violation of Article 6 §1 of the Convention." *Id.* at Article 6, *Fair Hearing by an Independent and Impartial Tribunal: Compliance, (f).*

States stands alone in the free world in denying its members of the Armed Forces the right to be tried by an independent and impartial court-martial panel. This Court must grant review to ensure that this practice ends in courts-martial empowered to sentence a member of the Armed Forces to death during peacetime. Basic due process demands as much.

III.

AN APPELLATE COURT CANNOT ASSUME THAT THE TRIAL JUDGE MADE A DETERMINATION AS TO WHETHER TRIAL COUNSEL'S EXPLANATION WAS CREDIBLE OR PRETEXTUAL PURSUANT TO *BATSON V. KENTUCKY*, 476 U.S. 79 (1986), WITHOUT CONDUCTING A FURTHER HEARING ON THE ISSUE, WHEN THE TRIAL JUDGE RULED ON PETITIONER'S BATSON CLAIM WITHOUT EVEN REQUIRING THE PROSECUTOR TO PROVIDE A RACE-NEUTRAL EXPLANATION FOR THE CHALLENGE.

In *Batson v. Kentucky*, 476 U.S. 79 (1986), this Court held that the discriminatory use of peremptory challenges by the prosecution against members of the same racial minority group as the defendant violated the defendant's right to equal protection. This Court established a three-step procedure for addressing objections to the discriminatory exercise of peremptory challenges. First, the trial judge must determine whether the defense has established "a *prima facie* case of purposeful discrimination." *Id.* at 96-97. Second, if "the requisite showing" is made, "the burden shifts" to the prosecution to "articulate a neutral explanation [for the challenge] related to the particular case to be tried." *Id.* at 96-98. Finally, the trial judge "will have the duty to determine if the defendant has established purposeful discrimination." *Id.* at 98. At Petitioner's capital court-martial, the military judge failed to perform his duty under *Batson* after the Petitioner made a *prima facie* case of

purposeful discrimination. The military judge allowed the prosecution to merely deny a discriminatory intent and not state a race-neutral explanation for the challenge. The Court of Appeals for the Armed Forces compounded the error by assuming that the military judge actually complied with *Batson* three days after the initial objection to the discriminatory challenge. *United States v. Gray*, 51 M.J. 1, 35 (1999).

At Petitioner's court-martial, the prosecution used its sole peremptory challenge, *see* Article 41(b), U.C.M.J.,[11] to remove Major Francis A. Quander, Jr., one of two African-American members remaining on Petitioner's court-martial panel. (R. at 762). The trial defense counsel objected and demanded an explanation, on the record, for the prosecution's biased peremptory challenge. *Id.* After establishing this *prima facie* case, the trial defense counsel attempted to explain further why he believed that the challenge was discriminatory. The military judge stopped him. The military judge did not require the prosecutor to provide an explanation for the challenge. Instead, the military judge asked the prosecution if the challenge was the "result of his bias or prejudice against the black race." The prosecutor indicated that he had not challenged Major Quander because of his race. Again, the military judge asserted that no further elaboration was necessary. (R. at 763). Three days

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[11] Petitioner questions the use of peremptory challenges by the prosecution in a capital court-martial during peacetime. Under Article 25, U.C.M.J., 10 U.S.C. § 825, the convening authority has already hand-picked members of his command who are "best qualified" to serve as court members. The apparent reason for peremptory challenges is to remove any lingering doubt about a court member's fitness to serve by permitting the party to remove that member from the panel. *See Ford v. Georgia*, 498 U.S. 411 (1991). Thus, the use of a peremptory challenge by the prosecution in a court-martial does not serve the same purpose as it does in the civilian criminal justice system, because the members selected have already been determined to be the "best qualified" by the convening authority, the prosecutor's commanding general.

later, the prosecutor attempted to clean up the record. At that time, the prosecutor asked that an unsworn statement be appended to the appellate record which attempted to justify the removal of Major Quander. (R. at 779); App. Exh. LVIII. The statement contends that Major Quander was not peremptorily challenged because of his race, but because the prosecutor believed that Major Quander's responses concerning the death penalty were "equivocal." [12] (R. at 779); App. Exh. LVIII. The court made no additional ruling or findings of fact based on the proffered rationale. In fact, there is no evidence in the record that the military judge even read the proffered statement. (R. 779). More importantly, the military judge's failure to conduct a hearing as dictated by *Batson* deprived trial defense counsel from developing further the basis for his objection to the peremptory challenge of Major Quander.

The military judge erred by granting the peremptory challenge without requiring the Government to provide a race-neutral explanation for the peremptory challenge of Major Quander and by relying solely upon the Government's mere denial of discriminatory intent. At that time, "the military judge made clear that he was not going to enter any findings of fact or conclusions of law on the issue of discrimination." *Gray*, 51 M.J. at 68 (Effron, J., and Cox, C.J., dissenting). Even after the prosecutor proffered a *post-hoc* explanation three days later, the military judge made no further findings. As Judge Effron points out "[t]here is absolutely no indication that the military judge attached any evidentiary value to trial counsel's statement, and the statement did not constitute in any way a ruling on the part

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[12] Major Quander was anything but equivocal concerning the death penalty. As Judge Effron noted: "The credibility of the prosecution's rationale was clearly at issue in this case. The record of trial reflects thoughtful responses by Major Quander to questions about the death penalty. He made clear that he could do his duty [and] follow the law as instructed by the military judge."

United States v. Gray, 51 M.J. at 69. (Effron, J. and Cox, C.J., dissenting).

of the military judge." *Id.* at 69. The record does not even reflect that the military judge read the proffered statement. "The mere filing of an appellate exhibit, after the military judge has refused to require compliance with *Batson*, does not remedy the error by the military judge." *Id.* at 68.

This Court has made clear that the mere denial of discriminatory intent does not comply with *Batson*'s second step. *Batson*, 476 U.S.at 98; *see also Purkett v. Elem*, 514 U.S. 765, 769 (1995). The record in this case establishes that such a bald denial is all that the military judge had before him when he overruled Petitioner's objection to the challenge of Major Quander. The military judge failed to comply with the clear procedural dictates of *Batson*. The prosecution was not required to provide an explanation for its challenge of Major Quander. The military judge failed to ensure that the procedural dictates of *Batson* were followed. In *Hernandez v. New York*, 500 U.S. 352 (1991), this Court emphasized the critical role of the trial judge in evaluating the sincerity of the prosecution's explanation for a peremptory challenge:

> In the typical peremptory challenge inquiry, *the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed.* There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge. As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies "peculiarly within a trial judge's province."

Id. at 365 (emphasis added); *see also Purkett v. Elem*, 514 U.S. 765, 768 (emphasizing that it is the responsibility of the trial judge, at the third step of the *Batson* inquiry, to assess the "persuasiveness" of the proffered "justification"). In this case, the military judge failed to even attempt to comply with this Court's clear procedural requirements as set forth in *Batson*. The military judge prevented the trial defense counsel from making the record as to his objection. The military judge failed to require the prosecutor to state a basis of the challenge on the

record. And finally, the military judge allowed the challenge based solely upon the prosecutor's statement that the challenge was not based upon race.

The record establishes that the military judge ruled on the *Batson* objection after the prosecutor denied a discriminatory intent, but before he proffered a factual basis for the challenge. In a 3-2 opinion, the three-member majority of the Court of Appeals for the Armed Forces concluded that the military judge "did more than require the trial counsel to simply state whether his 'challenge was a result of his bias or prejudice'" and that the military judge made an "implied ruling" on the question of pretext three days later. *Gray*, 51 M.J. at 34. The Court of Appeals ignores the simple, yet necessary, procedural requirements of *Batson*. Petitioner was denied a full and fair hearing on his allegation that the prosecution's challenge was racially discriminatory. This Court's holding in *Batson* requires strict compliance with the three-step procedure. The Court of Appeals decision in this case eviscerates the clear requirements of *Batson*. As Judge Effron eloquently concludes:

> The prosecution's unsworn after-the-fact memorandum [regarding its explanation for the challenge of Major Quander] is no substitute for the findings and conclusions that should have been made by the military judge who had presided over the *voir dire* of Major Quander, observed the demeanor of trial counsel and Major Quander and heard the tone of trial counsel's questions and Major Quander's responses. The end result in this case is that [the prosecutor] was, in effect, both the advocate for striking Major Quander and the judge of the credibility of his own explanation. That is unacceptable under *Batson* . . . and [its] progeny.

Gray, 51 M.J. at 71 (Effron, J., and Cox, C.J., dissenting).

The military judge "expressly declined on the record to apply [this Court's] precedent." *Id.* at 71. The majority opinion's assumption that the military judge properly ruled on the prosecution's *post-hoc* proffered explanation compounded the

error. Petitioner was denied his right to a full and fair resolution of his objection to the prosecution's challenge of Major Quander. The U.S. Court of Appeals for the Armed Forces should have followed its clear precedent, *see United States v. Santiago-Davila*, 26 M.J. 380, 393 (C.M.A. 1988), and remanded the case for a limited evidentiary hearing on the reasons for the peremptory challenge of Major Quander by the prosecution. *Gray*, 51 M.J. at 71. This Court should grant certiorari review to ensure the Court's bedrock holding that a defendant has "the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria" is not eroded by the failure of judges to comply with the strict procedural requirements of *Batson v. Kentucky*, 476 U.S. 79, 85-86 (1994).

CONCLUSION

For the foregoing reasons, this Court should grant review of the judgment of the United States Court of Appeals for the Armed Forces.

Respectfully submitted,

THOMAS H. DUNN
Florida Bar No. 871753
303 Elizabeth Street, N.E.
Atlanta, GA 30307
(404) 222-9202
Counsel of record

BLAIR T. O'CONNOR
Captain, Judge Advocate
General's Corps (JA)
901 N. Stuart Street, Suite 340
Arlington, VA 22203
(703) 588-7952

ADELE H.ODEGARD
Colonel, JA
Chief, Defense Appellate Division

ATTORNEYS FOR PETITIONER

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, Appellee

v.

Ronald A. GRAY, Specialist Four
U.S. Army, Appellant

No. 93-7001

CMR No. 8800807

Argued March 7, 1995

Reargued December 17, 1996

Decided May 28, 1999

Accused was convicted by general court-martial, Raymond C. McRorie, J., of two premeditated murders, and the attempted premeditated murder of another. He was also found guilty of rape (3 specifications), robbery (2 specifications), and forcible sodomy (2 specifications) with respect to the above victims, as well as burglary and larceny of property of another person. The United States Army Court of Military Review, 37 M.J. 730, affirmed findings and death sentence. Review was granted. The United States Court of Appeals for the Armed Forces, Sullivan, J., held that (1) posttrial evidence of organic brain damage did not warrant a new trial; (2) accused did not establish that he was denied competent psychiatric assistance; (3) statements which accused made pursuant to his guilty pleas in state court were admissible; (4) accused did not establish presumed prejudice from pretrial publicity; (5) military judge did not abuse his discretion in denying accused's request for an independent investigator; (6) trial counsel's statement

of "race-neutral" explanation for the government's use of its peremptory challenge against black panel member complied with *Batson;* (7) military judge did not preclude members of court-martial from considering admitted evidence of accused's family and social background as a mitigating circumstance in their death-penalty decision; and (8) military judge did not have a duty to inform accused about trial defense counsel's total inexperience in capital and murder cases, and their lack of death-penalty continuing legal education.

Affirmed.

SULLIVAN, J., delivered the opinion of the Court in which CRAWFORD and GIERKE, JJ., joined. EFFRON, J., filed a dissenting opinion in which COX, C.J., joined.

Counsel

For Appellant: *Captain Silas R. Deroma* (argued and reargued) and *Major Michael A. Egan* (reargued); *Colonel Stephen D. Smith, Colonel John T. Phelps II, and Captain Christopher W. Royer* (on brief); *Captain Michael E. Hatch and Captain Michael E. Smith.*

For Appellee: *Captain John G. Giovannelli* (argued) and *Major Lyle D. Jentzer and Captain Steven H. Levin* (reargued); *Colonel John M. Smith, Lieutenant James L. Pohl, Lieutenant Colonel Eva M. Novak,* and *Captain Michael E. Mulligan* (on brief); *Colonel Dayton M. Cramer, Major Joseph C. Swetnam,* and *Captain Glenn L. Kirschner.*

Judge SULLIVAN delivered the opinion of the Court.

During December of 1987 and the first 4 months of 1988, appellant was tried by a general court-martial composed of officer and enlisted members at Fort

Bragg, North Carolina. Contrary to his pleas, he was found guilty of the premeditated murder of Ms. Kimberly Ann Ruggles and of Private Laura Lee Vickery-Clay, and the attempted premeditated murder of Private Mary Ann Lang Nameth. *See* Arts. 118 and 80, Uniform Code of Military Justice, 10 USC §§ 918 and 880, respectively. He was also found guilty of rape (3 specifications), robbery (2 specifications), and forcible sodomy (2 specifications) with respect to the above victims, as well as burglary and larceny of property of another person, in violation of Articles 120, 122, 125, 121, and 129, UCMJ, 10 USC §§ 920, 922, 925, 921, and 929, respectively. On April 12, 1988, he was sentenced to death, a dishonorable discharge, total forfeitures, and reduction to Private E-1. On July 29, 1988, the Commanding General of the 82d Airborne Division approved the sentence.

The record of appellant's trial was then forwarded to Defense Appellate Division and received by that organization on August 8, 1988. Counsel filed initial pleadings with the Court of Military Review[1] on September 15, 1989. On February 13, 1990, that court ordered a sanity board, which, on June 30, 1990, found that appellant was mentally responsible at the time of the offense and that he was mentally competent to understand his trial and the present appellate proceedings. On July 20, 1990, the Government Appellate Division answered appellant's assignment of errors.

On December 27, 1990, appellant filed a motion with the Court of Military Review requesting that court to order the Government to provide $15,000.00 for an expert psychiatrist, a death-penalty-qualified attorney, and an investigator. Oral arguments were heard on the

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[1]*See* 41 MJ 213, 229 n.* (1994).

motion in January 1991. On March 12, 1991, the Court of Military Review denied the motion. 32 MJ 730. Appellant renewed the request for a psychiatrist and an investigator on August 7, 1991, but the Court of Military Review denied it on August 23, 1991. On September 12, 1991, appellant filed a writ-appeal petition requesting that this Court order the Government to provide $10,000 and an emergency stay of the proceedings before the Court of Military Review. On October 18, 1991, this Court denied the writ-appeal petition and the stay application. 34 MJ 164 (summary disposition).

On December 16, 1991, appellant filed a motion with the Court of Military Review requesting that court to order additional medical and neuropsychological tests be performed by military authorities. On December 31, 1991, that court granted appellant's request and ordered a Magnetic Resonance Imaging (MRI) scan of the brain; a 20-channel scalp electrode, sleep-deprived EEG; and a SPECT scan of his brain, as well as intellectual, neuropsychological, academic, psycho-logical, and personality tests. On February 18, 1992, a report based on these tests was completed by Fred H. Brown, Jr., Captain, Ph.D., a clinical neuropsychologist from Womack Army Medical Center, Fort Bragg. He later opined in an affidavit filed with the appellate court below that appellant was sane at the time of the offense and during these proceedings. On March 9, 1992, counsel filed a petition for new trial based on newly discovered evidence of lack of mental responsibility.

On February 26, 1992, appellant filed a supplementary assignment of errors, to which the Government responded on March 27, 1992. The Court of Military Review heard oral argument on April 8, 1992, and on December 15, 1992, denied the petition for new trial and affirmed the findings and sentence. 37 MJ 730, 734-35, 742-43, 749. On

December 30, 1992, appellant filed a motion renewing his request for funds for an expert investigator and a behavioral neurologist. Appellant filed a petition for reconsideration of this decision on January 4, 1993. The Court of Military Review heard oral arguments on the motion for funding on January 21, 1993, and denied the motion for funding and the petition for reconsideration on January 22, 1993. On February 11, 1993, appellant filed a motion and suggestion for reconsideration by the court sitting *en banc* of the denial of funding, and a motion and suggestion for reconsideration by the court sitting *en banc* of the decision of December 15, 1992. On March 11, 1993, the court denied both motions and the suggestions for reconsideration *en banc*, but granted a motion allowing appellant to file a supplemental assignment of errors (XXVIII-LVI). The Government answered this assignment of errors on April 12, 1993. On June 9, 1993, the Court of Military Review again affirmed the findings and sentence. 37 MJ 751. Appellant filed a motion for reconsideration on June 28, 1993, which the court denied on June 30, 1993.

This case is before our Court for mandatory review pursuant to Article 67(a)(1), UCMJ, 10 USC § 867(a)(1) (1989). On July 2, 1993, this Court ordered appellant to file his final brief by August 31, 1993, but counsel did not do so until June 30, 1994. On September 10, 1993, appellant moved this Court for funding of an expert investigator and a behavioral neurologist whom he stated were necessary for appellant to perfect his appeal to this Court. The Government filed its opposition on September 17, 1993. On November 24, 1993, lead defense appellate counsel, Captain Michael Smith, filed a motion to withdraw from appellate representation because he was being transferred. On April 7, 1994, this Court granted Captain Smith's motion. 40 MJ 14.

This Court denied appellant's motion for funding on April 25, 1994, without prejudice to appellant's raising in the ordinary course of appellate review whether the Court of Military Review erred in upholding denial of the funding. 40 MJ 25. On June 30, 1994, appellant filed his final brief; however, the index was not received until July 11, 1994. The Government filed its answer to final brief on August 26, 1994, and appellant's reply was received on October 7, 1994. Oral argument was first heard in this case on March 7, 1995.

On May 4, 1995, defense appellate counsel, Captain Royer, moved to withdraw from appellate representation because he was being transferred; he also moved to admit an affidavit by appellant stating that he wished Captain Royer "be released from his representation of" appellant. This Court granted both motions on May 19, 1995. 43 MJ 129.

On June 3, 1996, the Supreme Court issued its decision in *Loving v. United States*, 517 U.S. 748, 116 S.Ct. 1737, 135 L.Ed. 2d 36. On November 20, 1996, based on Justice Stevens' separate opinion in *Loving*, 517 U.S. at 774-75, 116 S.Ct. at 1751-52, appellant's counsel moved to file a supplemental issue challenging the jurisdiction of his.court-martial. On December 4, 1996, this motion was granted. 46 MJ 196. On December 13, 1996, the Government filed its Answer to Appellant's Supplemental Issue. Oral argument was held again in this case on December 17, 1996.

FACTUAL BACKGROUND OF THE CRIMES

Before turning to the issues of this capital case, it is important to view this case and its issues in the factual context of appellant's crimes. In January 1987, appellant was identified and arrested for the rape of a woman in the vicinity of Fairlane Acres, a trailer park

near Fort Bragg, North Carolina. The next day the body of Ms. Kimberly Ann Ruggles was found near that area on Fort Bragg. "She had received multiple stab wounds" and had "suffered bruises on her eyebrow, bruises on her nose, and a laceration on her lip." She had been raped and anally sodomized. Evidence in her vehicle and in his possession implicated appellant.

Later the same month, the body of Private (PVT) Laura Lee Vickery-Clay was found. "She had been shot four times (while she was alive), in the neck, forehead, chest, and back of the head. Also, she had suffered blunt force trauma to the right cheek, the left side of her face, around her left eye, her left breast, abdomen, and both legs and arms." PVT Vickery-Clay "had been raped and anally sodomized." Evidence on her car and the murder weapon implicated appellant.

Subsequent media coverage of appellant's arrest for these crimes produced another victim (PVT Nameth), who recognized his face from photographs of appellant on television and in the newspaper. She reported that appellant had "raped her, and stabbed her repeatedly in the neck and side"; she "suffered a laceration of the trachea and a collapsed or punctured lung." 37 MJ at 736.

The above crimes were tried by court-martial which found appellant guilty and gave him the death penalty. Appellant was also convicted in a North Carolina state court of the murders and rapes of two other young women, and he was given sentences of life in prison. Appellant entered guilty pleas to the murders tried in State court. *See* 37 MJ at 733 n. 1.

INTRODUCTION

Article 67(a)(1994) provides that the United States Court of Appeals for the Armed Forces shall review the

record in all cases in which the sentence, as affirmed by a Court of Criminal Appeals, extends to death. Appellant was sentenced to death by the members of his court-martial, and this sentence was approved by the convening authority and affirmed by the Court of Military Review (now the Court of Criminal Appeals). Defense appellate counsel has raised 70 issues for this Court to consider with respect to the findings of guilty and the sentence in this case. Appellant himself has personally assigned 31 more issues for review.

This is a long opinion. It is long because we feel it is necessary to explain our resolution of the numerous issues involved in this case. Many of these issues raise systemic challenges to the military justice system in general or its capital sentencing procedures in particular which we have resolved in our previous decisions. The remaining issues concern application of these procedures in appellant's case. Except for the supplemental issue, which we consider first, we will turn our attention to the issues in the order raised by appellant.

SUPPLEMENTAL ISSUE

WHETHER APPELLANT WAS DENIED DUE PROCESS OF LAW IN VIOLATION OF THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS BECAUSE HE WAS TRIED BY COURT-MARTIAL FOR CAPITAL MURDER DURING PEACETIME.

The thrust of appellant's argument is that the decision of the Supreme Court in *Solorio v. United States*, 483 U.S. 435, 107 S.Ct. 2924, 97 L.Ed.2d 364 (1987), upholding court-martial jurisdiction solely on the basis of an accused's status as a service member, without considering the service connection of those offenses, applies only in non-capital cases. He cites Justice Stevens' concurring

opinion in *Loving*, 517 U.S. at 774, 116 S.Ct. at 1 751, where he stated that "[t]he question whether a 'service connection' requirement should obtain in capital cases is an open one[.]" Appellant finally contends that his capital-murder charges were not shown to be service connected.

We agree with Justice Stevens that the question whether *Solorio* applies in a capital case is an important question. However, our particular response to appellant is that this question need not be decided in his case. We note that appellant was a member of the military; one of his murder victims was a member of the military and the other was a civilian who did business on post; and both their bodies were found on post. Finally, we agree with the Government that there was overwhelming evidence presented in this case that the murders were committed on post. This is sufficient service connection even under *O'Callahan v. Parker*, 395 U.S. 258, 272, 89 S.Ct. 1683, 23 L.Ed.2d 291 (1969), which *Solorio* overruled, 483 U.S. at 436, 107 S.Ct. 2924, to warrant trial by court-martial. *See generally Relford v. Commandant*, 401 U.S. 355, 369, 91 S.Ct. 649, 28 L.Ed.2d 102 (1971) ("a serviceman's crime against the person of an individual upon the base . . . is 'service connected'"). Accordingly, assuming this jurisdictional requirement applies in capital courts-martial, we hold that it was satisfied in appellant's case.

ISSUE I

WHETHER MILITARY DUE PROCESS AND UCMJ ARTICLES 66 AND 67 REQUIRE THE COURT OF MILITARY APPEALS[2] AND THE COURTS OF MILITARY REVIEW TO REVIEW ALL CAPITAL CASES *IN FAVOREM VITAE*

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[2] Now the Court of Appeals for the Armed Forces.

SINCE CAPITAL LITI-GATION IS IN ITS INFANCY IN THE MILITARY JUSTICE SYSTEM AND TRIAL AND APPELLATE DEFENSE COUNSEL LACK THE TRAINING AND EXPERIENCE NECESSARY TO PRESERVE THE RECORD ON ALL ISSUES AND PREVENT APPLICATION OF WAIVER.

ISSUES II

WHETHER A FACTFINDING COURT OF MILITARY REVIEW MUST UNANIMOUSLY AGREE ON BOTH FINDINGS OF GUILT AND THE SENTENCE IN A CAPITAL CASE AND MUST APPLY A POLICY OF *IN FAVOREM VITAE.*

The first issue asks us to specifically mandate an "in favorem vitae" [in favor of life] policy for appellate review of capital cases in the military justice system. In other words, appellant asks this court to eschew waiver and overlook any procedural defaults by his counsel at trial in reviewing his death sentence. *See Smith v. Murray,* 477 U.S. 527, 539, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986) (Stevens, J., dissenting). We rejected such a request in *United States v. Loving,* 41 MJ 213, 266 (1994), *aff'd on other grounds,* 517 U.S. 748, 116 S.Ct. 1737, 135 L.Ed.2d 36 (1996). For the reasons stated in our *Loving* decision, we adhere to that rejection today. The second issue has not been specifically briefed by defense appellate counsel, but we otherwise conclude that it has no legal merit. *See* Art. 66, UCMJ, 10 USC § 866 (1989); *cf.* Art. 52, UCMJ, 10 USC § 852.

ISSUE III

WHETHER THE ARMY COURT OF MILITARY REVIEW ABUSED ITS DISCRETION IN DENYING SPC GRAY'S PETITION FOR NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE OF ORGANIC BRAIN DAMAGE.

Article 73, UCMJ, 10 USC § 873 (1968), provides:

> **§ 873. Art. 73. Petition for a new trial**
>
> At any time within two years after approval by the convening authority of a court-martial sentence, *the accused may petition the Judge Advocate General for a new trial on the grounds of newly discovered evidence* or fraud on the court. If the accused's case is pending before a Court of Military Review or before the Court of Military Appeals, the Judge Advocate General shall refer the petition to the appropriate court for action. Otherwise the Judge Advocate General shall act upon the petition.

(Emphasis added.) *See* RCM 1210(f)(2), Manual for Courts-Martial, United States, 1984. Appellant presented such a petition to the Court of Military Review which in turn denied it. 37 MJ at 742-43. We review such decisions by a Court of Military Review on a clear abuse-of-discretion standard. *See generally United States v. Williams*, 37 MJ 352, 356 (CMA 1993); S. Childress and M. Davis, 2 *Federal Standards of Review* § 11.38 at 11-158 (2d ed. 1992) (clear-abuse-of-discretion standard).

The appellate court below noted the legal requirements which must be met to warrant a new trial under Article 73. Relying on RCM 1210(f)(2), it stated that appellant must show:

> (A) The evidence was discovered after the trial;
>
> (B) The evidence is not such that it would have been discovered by the petitioner at the time of trial in the exercise of due diligence; and
>
> (C) The newly discovered evidence, if considered by a courtmartial in the light of all other pertinent evidence, would probably produce a substantially more favorable result for the accused.

37 MJ at 742. We agree with the Court of Military Review that this is a proper explanation of Article 73. *See Williams, supra* at 356. Moreover, we have previously commented on what constitutes an abuse of discretion in this context:

> Legal error *(i.e.*, an abuse of discretion) occurs if the findings of fact upon which he [the judge] predicates his ruling are not supported by evidence of record; if incorrect legal principles were used by him in deciding this motion; or if his application of the correct legal principles to the facts of a particular case is clearly unreasonable. *United States v. Travers*, 25 MJ 61, 62-63 (CMA 1987); *United States v. Rosser*, 6 MJ 267, 271 (CMA 1979). *See United States v. Thomas*, 3 USCMA 161, 11 CMR 161 (1953).

37 MJ at 356.

Turning to the present case, we note that the appellate court below essentially summarized the evidence offered by appellant as "newly discovered," as follows:

> In his petition the appellant relies heavily on an affidavit by Dr. Jonathan Pincus, a physician specializing in neurology. After reviewing the results of the tests and evaluations of the

> appellant, *Dr. Pincus concluded that the appellant suffers from organic brain defects that probably impaired his capacity to distinguish right from wrong and conform his conduct to the law.* Dr. Pincus did not personally examine the appellant, nor did he review the testimony of the experts. His diagnosis is based only upon his review of all the previous sanity evaluations and the neurological test results.

37 MJ at 742 (emphasis added).

That court also was required to determine "beyond a reasonable doubt" whether a reasonable factfinder, considering "the totality of evidence, would . . . be convinced by clear and convincing evidence that appellant lacked mental responsibility for his crimes" or should not get the death penalty for them. *See United States v. Cosner*, 35 MJ 278, 281, 282 (CMA 1992), *cert. denied*, 510 U.S. 1085, 114 S.Ct. 918, 127 L.Ed.2d 206 (1994). The Court of Military Review concluded that this post-trial medical evidence was "not of a caliber to produce a more favorable verdict" and that they were "convinced beyond a reasonable doubt that the panel would still have imposed the death sentence." *Id.* at 743. We see no clear abuse of discretion in this decision. *See generally United States v. McCarthy*, 54 F.3d 51, 55 (2d Cir.) (no abuse of discretion to deny new trial based on newly discovered interim psychiatric report), *cert. denied*, 516 U.S. 880, 116 S.Ct. 214, 133 L.Ed.2d 145 (1995).

Appellant was found guilty of numerous offenses of a heinous nature, namely two premeditated murders, one attempted murder involving multiple stabbing of the victim, as well as rapes and forcible sodomies. At his court-martial, he did not rely on a defense of insanity. *See* Art. 50a, UCMJ, 10 USC § 850a. However, he did

introduce expert evidence on his mental state for purposes of sentence mitigation. RCM 1001 (c)(1)(A) and (B); as well as 1004(b)(3) and (b)(4)(c). Post-trial he has attempted to raise the defense of insanity and introduce further mental-state mitigation evidence by means of the written statements of two psychiatrists and the results of further mental testing ordered by the Court of Military Review at his request. *Cf. Sawyer v. Whitley*, 945 F.2d 812, 823 (5th Cir. 1991), *aff'd on other grounds*, 505 U.S. 333, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992).

The Court of Military Review, in its opinion below, noted the development of evidence and other information concerning appellant's mental state. It stated:

> Prior to his court-martial, two psychiatrists and a psychologist individually examined the appellant. Based on their evaluations, including a statement that the appellant exhibited symptoms associated with organic involvement, the defense did not raise a sanity issue on the merits of the trial. Since his court-martial, the appellant has been the subject of two sanity boards and extensive neurological testing, which the appellant contends contains the new evidence warranting a new trial. . . .
>
> * * *
>
> The most recent sanity board (June 1990) concluded that the appellant's mental infirmities were not so severe as to render him not mentally responsible. Additionally, although the members found undifferentiated brain damage, the board reported that it does not appear of sufficient magnitude to negate

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> criminal responsibility. In the words of the board, in order to warrant a finding of a severe *mental defect, there would* have to be a severe organic disorder, which there is not. The neuropsychological evaluation, ordered by this Court on 31 December 1991 and administered by Dr. Fred Brown, a clinical neuropsychologist, does refer to evidence of organic brain damage. Nevertheless, although Dr. Brown states he did find evidence of symptoms of an undetermined organic brain syndrome, he did not find evidence of a psychological or personality disorder resulting from the organic brain syndrome such that it would meet criteria of an organic mood (thought anxiety).
>
> *More specifically, in an affidavit dated 23 March 1992 obtained by the appellee, Dr. Brown stated that despite appellant's mild organic brain damage the appellant is now, and Dr. Brown believes was at the time of the offenses, able fully to appreciate the nature and quality of his acts and the wrongfulness of his acts.*

37 MJ at 742-43 (emphasis added).

Organic brain damage by itself does not equate to lack of mental responsibility for one's crimes, and its discovery after trial does not necessarily require a new trial. *See Robedeaux v. State*, 908 P.2d 804, 808 n.22 (Okl.Cr. 1995); *James v. State*, 489 So.2d 737, 739 (Fla. 1986), *overruled on other grounds, James v. Singletary*, 957 F.2d 1562, 1574-75 (11th Cir. 1992). Moreover, the establishment of conflicting expert opinion on an accused's mental state does not necessarily require a rehearing. *United States v. Van Tassel*, 38 MJ 91, 96

(CMA 1993). In appellant's case the Court of Military Review pointed out that there was some evidence of appellant's organic brain damage in existence prior to this trial and the post-trial evidence was disputed as to the *extent of this damage.* More importantly, the post-trial evidence was somewhat speculative on the effect of this mental condition on appellant at the time of these offenses and it too was disputed. *See Oats v. Singletary,* 141 F.3d 1018, 1028 (11th Cir. 1998); *Bryan v. Singletary,* 140 F.3d 13 54, 1360 (11th Cir. 1998), *cert. denied,* ____ U.S. ____, 119 S.Ct. 1068, 143 L.Ed.2d 72 (1999); *State v. Stuard,* 863 P.2d 881, 901 (Ariz. 1992). In these circumstances we hold that the Court of Military Review did not clearly abuse its discretion in concluding this post-trial evidence, in light of all other pertinent evidence in this case, would probably not produce a substantially more favorable result for appellant at a new trial. *See Brewer v. Reynolds,* 51 F.3d 1519, 1526-27 (10th Cir. 1995), *cert. denied,* 516 U.S. 1123, 116 S.Ct. 936, 133 L.Ed.2d 862 (1996); *Robedeaux v. State, supra.*

ISSUE IV

WHETHER APPELLANT WAS CONVICTED AND SENTENCED TO DEATH IN VIOLATION OF THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS OF THE UNITED STATES CONSTITUTION BECAUSE THE SENTENCE AND CONVICTIONS ARE FOUNDED AT LEAST IN PART UPON MISINFORMATION OF A CONSTITUTIONAL MAGNITUDE CONCERNING HIS MENTAL HEALTH.

Appellant grounds this attack on his conviction primarily on the decision of the Supreme Court in

Johnson v. Mississippi, 486 U.S. 578, 580, 590, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988). There, the Supreme Court reversed a death sentence because it was based in part on aggravating-factor evidence which was purposefully presented to the jury and which was "materially inaccurate" (*i.e.*, a state conviction later reversed on appeal). Appellant argues here that the post-trial evidence concerning his mental state at the time of the offenses shows that his court-martial members were substantially misinformed when they found him guilty and sentenced him to death. *See United States v. Tucker*, 404 U.S. 443, 447, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972) and *Townsend v. Burke*, 334 U.S. 736, 68 S.Ct. 1252, 92 L.Ed.2d 1690 (1948) ("misinformation of constitutional magnitude" or materially untrue" required); *see also United States v. Mack*, 9 MJ 300, 319 (CMA 1980). He also asserts that the Court of Military Review employed the wrong legal standard in deciding this legal issue.

Appellate defense counsel argued as follows:

> [T]rial defense counsel did not present any evidence on the merits concerning appellant's mental health because they had been informed by Drs. Armitage and Rose that there was nothing that could be used on the merits. On sentencing, the trial counsel made repeated arguments to the court-martial panel that appellant's personality disorder was completely insignificant and that appellant had not given the court-martial any type of "empirical" explanation to help make some sense of the crimes for which appellant stood convicted. (R. at 2534-37.) The wealth of evidence in mitigation which has been uncovered following the court-martial shows

> that the government's position at trial, which was urged and apparently adopted by the panel, was incorrect and inaccurate.
>
> There is a great difference between a personality disorder described as "an umbrella, a nonspecific personality disorder . . . a little bit of this, and a little bit of that . . . he's not quite normal. . . . . (R. at 2535), and a disorder which would cause marked cognitive impairment. Appellant's organic brain damage is a demonstrable, physical disorder of appellant's brain with broad reaching implications. *(See* Def. App. Exh. H, O.) The powerful explanatory impact this evidence would have on a court-martial cannot be ignored. *See* Issue III.

Final Brief at 47-48 (footnote omitted).

The Court of Military Review in resolving this claim held that appellant had "failed to show by clear and convincing evidence that, but for constitutional error . . . no reasonable court members would have imposed the death penalty under the Uniform Code of Military Justice." 37 MJ at 743-44; *cf. Romano v. Oklahoma*, 512 U.S. 1, 11, 114 S.Ct. 2004, 129 L.Ed.2d I (1994*) (Johnson* does not establish *per se* rule of reversal of a death sentence). Also, it rejected his argument based on *Johnson v. Mississippi, supra*, because appellant had not shown the information relied on by the court members was "incorrect." 37 MJ at 743; *see Mahaffey v. Page*, 151 F.3d 671, 681 (7th Cir. 1998), *vacated as to another issue*, 162 F.3d 481 (7th Cir. 1998); *Del Vecchio v. Illinois Dept. of Corrections*, 31 F.3d 1363, 1385 (7th Cir. 1994) (mere inaccuracy in sentencing information is not enough to invalidate death sentence), *cert. denied*, 514 U.S. 1037, 115 S.Ct. 1404, 131 L.Ed.2d 290 (1995). As noted above, the post-trial evidence as to the extent of the organic

brain damage and its impact on appellant's mental responsibility at the time of the offenses was speculative and disputed. *Cf. James*, 957 F.2d at 1575 (alleged actual incompetence rather than probable incompetence). Moreover, the court below pointed out earlier in a different context, that "according to the appellant's own brief there were 'clear indicators of appellant's organic brain damage . . . presented at the time of trial. . . .'" 37 MJ at 742. *See Wright v. Angelone, 151* F.3d 151, 162 (4th Cir. 1998). Accordingly, we conclude that there was no material or substantial inaccuracy in the sentencing information established in this case by the post-trial psychiatric evidence. *See generally Brewer v. Reynolds, supra.*

It is the normal rule of military appellate practice that review of the guilt of an accused is limited to evidence presented at trial. *United States v. Bethea*, 22 USCMA 223, 46 CMR 223 (1973). However, recourse to post-trial affidavits during direct review is appropriate to decide petitions for new trial under Article 73 *(see United States v. Parker*, 36 MJ 269, 270 (CMA 1993)), or clarify collateral matters such as claims of unlawful command influence or denial of effective assistance of counsel. *Id.* at 271-72. Finally, this Court has approved con-sideration of post-trial affidavits by Courts of Military Review on direct review to determine whether a post-trial sanity hearing should be ordered. *See United States v. Massey*, 27 MJ 371 (CMA 1989); RCM 706 and 1203(c)(5). We have never held, however, that a post-trial psychiatric report *per se* requires a new trial or a hearing under *United States v. DuBay*, 17 USCMA 147, 37 CMR 411 (1967).

ISSUE V

WHETHER APPELLANT WAS CONVICTED WITHOUT DUE PROCESS OF LAW

BECAUSE HE WAS DENIED COMPETENT PSYCHIATRIC ASSISTANCE IN THE EVALUATION, PREPARATION, AND PRESENTATION OF HIS CASE.

Appellant challenges the findings of guilty and his death sentence in this case on the basis that he was not provided "competent psychiatric assistance" at his court-martial. He particularly attacks the psychiatric assistance provided to him prior to and during trial by Doctor Armitage, Doctor Rose, and Doctor Warren. He claims that they all misdiagnosed him as having an unspecified personality disorder rather than organic brain damage and failed to follow recognized standards of care in treating him. He bases these claims on the post-trial statements of two other psychiatrists, Doctor Pincus and Doctor Merikangas.

The Supreme Court in *Ake v. Oklahoma*, 470 U.S. 68, 83, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), stated:

> We therefore hold that when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, *the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.* This is not to say, of course, that the indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own. Our concern is that the indigent defendant have access to a competent psychiatrist for the purpose we have discussed, and as in the case of the provision of counsel we leave to the State the decision on how to implement this right.

(Emphasis added.) Who is a competent psychiatrist and what is an appropriate examination were not particularly delineated by the Supreme Court in *Ake*. The Court of Military Review flatly rejected appellant's preferred "national standard of care in psychiatry" and his argument based on this standard that his trial psychiatrists and psychologist provided him ineffective assistance under *Ake*. 37 MJ at 744-45. We agree. *See Harris v. Vasquez*, 949 F.2d 1497 (9th Cir. 1990), *cert. denied*, 503 U.S. 910, 112 S.Ct. 1275, 117 L.Ed.2d 501 (1992); *Silagy v. Peters*, 905 F.2d 986 (7th Cir. 1990), *cert. denied*, 498 U.S. 1110, 111 S.Ct. 1024, 112 L.Ed.2d 1106 (1991).

As a starting point, we note that prior to his court-martial appellant was personally examined by a military forensic psychiatrist, Colonel David Armitage. He was also personally examined by Doctor Selwyn Rose, a civilian forensic psychiatrist, and Doctor John Warren, a civilian psychologist. The latter two were chosen by the defense, Answer to Final Brief at 31 n.22, and all three testified at appellant's sentence hearing. Moreover, all three were offered as qualified medical experts by the defense and accepted as such by the judge. Clearly, these persons were qualified experts within the meaning of *Ake*. *See Dunn v. Johnson*, 162 F.3d 302, 308 (5th Cir. 1998); *Provenzano v. Singletary*, 148 F.3d 1327, 1333 (11th Cir. 1998).

Appellant's post-trial attack, however, is on the psychiatric assistance these experts provided to the defense in his case. *See Wilson v. Greene*, 155 F.3d 396, 400 (4th Cir. 1998). Initially, he focuses on "[t]he striking disparity between the pretrial [unspecified personality disorder] and post-conviction [organic brain damage] evaluations." Final Brief at 52, 53. He essentially argues that his trial experts were so wrong

in their diagnosis of appellant that they must have been incompetent or ineffective. We must reject this argument.

We initially note that divergence of opinion among psychiatrists is not novel and does not provide a legal basis for concluding that one or the other is performing inappropriate tests or examinations. In *Ake*, the Supreme Court said: "Psychiatry is not, however, an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness, on the appropriate diagnosis to be attached to given behavior and symptoms, on care and treatment, and on likelihood of future dangerousness." See 470 U.S. at 81. In any event, four other post-trial evaluations of appellant substantially agree with the trial experts that appellant's personality disorders, even if accompanied by organic brain damage, did not eliminate his mental responsibility at the time of the offenses: Doctor (PhD) Kea, Doctor (MD) Marceau, Doctor (MD) Edwards, and Doctor (PhD) Brown. *See Vickers v. Stewart*, 144 F.3d 613, 615-16 (9th Cir. 1998), *cert. denied*, ___ U.S. ___ , 119 S.Ct. 809, 142 L.Ed.2d 669 (1999). Finally, unlike the seven other experts in this case, Doctor Pincus, the primary proponent of the organic-brain-damage diagnosis and appellant's lack of mental responsibility, did not personally examine appellant or the record in this case. *See United States v. Wimberley*, 16 USCMA 3, 8, 36 CMR 159, 164 (1966).

Nevertheless, appellant mounts a more particular attack on his trial psychiatrists and psychologist, resting on the post-trial affidavits of Doctor Merikangas, a civilian psychiatrist. Doctor Merikangas posits a "national standard of care" in psychiatry and asserts that the pretrial psychiatric assistance in appellant's case failed to meet that standard. He states in pertinent part:

9. Based upon my review of the above records, it is my professional opinion that Mr. Gray has not yet received a psychiatric evaluation that meets the applicable national standard of care for professional psychiatric evaluations. Specifically, the following problems are apparent with the psychiatric evaluations Mr. Gray has received to date:

a. the absence of a complete neurological work-up to include a battery of blood tests and Magnetic Resonance Imaging (MRI) scan of the brain. The absence of such a workup in Mr. Gray's case alone violates the standard of care because of the numerous signs that point to possible brain damage: prior head injury, the nature of the crimes committed, the abnormal EEG results, and the history of alcohol abuse all are indicative of the need for further diagnostic steps.

b. the absence of a thorough history of Mr. Gray's including a medical history, with particular attention on Mr. Gray's prior head injury from military parachuting, a history of any present illnesses, a family history, and a history of his past life including development, education, occupations and marriage.

We, like the Court of Military Review, do not welcome descent into the "psycholegal" quagmire of battling psychiatrists and psychiatric opinions, especially when one side wages this war against its own experts by means of post-trial affidavits. *Harris*, 949 F.2d at 151 8. In any event, appellant's particular claim of inadequate psychiatric assistance we find without merit for several reasons. First, the Government provided appellant with two qualified psychiatric experts of his own choosing

prior to trial. *Loving*, 1 MJ at 250-41; *cf. Smith v. McCormick*, 914 F.2d 1153, 1159 (9th Cir. 1990). Second, these defense experts provided appellant with favorable testimony, although not perhaps to the degree he desired. *Cf. Cowley v. Stricklin*, 929 F.2d 640, 645 (11th Cir. 1991). Finally, the alleged deficiencies in the trial experts' evaluations were substantially obviated by the additional testing ordered in this case which produced substantially the same results. 37 MJ at 745; *see also Fairchild v. Lockhart*, 900 F.2d 1292, 1296 n.3 (8th Cir.), *cert. denied*, 497 U.S. 1052, 111 S. Ct. 21, 111 L. Ed.2d 834 (1990). Accordingly, we conclude this issue is without merit. *See generally Wilson*, 155 F.3d at 400-02.

ISSUE VI

WHETHER APPELLANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BY TRIAL DEFENSE COUNSEL'S FAILURE 1) TO INVESTIGATE THE MITIGATING CIRCUMSTANCES OF APPELLANT'S TRAUMATIC FAMILY, SOCIAL, AND MEDICAL HISTORIES AND APPELLANT'S INTOXICATION AT THE TIME OF THE OFFENSES; 2) TO CHALLENGE THE PROFESSIONAL COMPETENCE OF THE PRETRIAL EVALUATIONS OF APPELLANT BY THE TWO FORENSIC PSYCHIATRISTS AND TO ENSURE A COMPLETE AND COMPETENT MENTAL HEALTH EVALUATION OF APPELLANT WAS PERFORMED BEFORE TRIAL; 3) TO DEVELOP AND PRESENT AN AVAILABLE DEFENSE ON THE MERITS; 4) TO PRESENT AN ADEQUATE CASE DURING THE SENTENCING HEARING.

Appellant relies on *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), to assert that he was denied his constitutional right to effective assistance of counsel. He then lists four areas in which he contends counsel's performance was deficient. Finally, he asserts that his counsel's conduct in this regard prejudiced him in a way directly leading to his convictions and sentence to death. We disagree with appellant that his lawyers' conduct was deficient within the meaning of *Strickland v. Washington, supra.*

The first part of the *Strickland* test focuses on whether defense counsel's performance was constitutionally ineffective. The Supreme Court has made clear that determination of this question requires assessment of the particular facts of a case, using *"an objective standard of reasonableness." Id.* at 688, 104 S.Ct. 2052 (emphasis added). Appellant must show that his counsel's conduct was not within the "wide range of professionally competent assistance." *Id.* at 690, 104 S.Ct. 2052.

(1) Failure to investigate

We turn first to appellant's argument that his defense counsel failed "to investigate the mitigating circumstances of appellant's traumatic family, social, and medical histories and appellant's intoxication at the time of the offenses." The problem with appellant's argument is that it equates failure to discover certain facts with failure to conduct a proper investigation. In addition, it ignores any role he himself may have played in remaining silent and failing to make full disclosure to his attorney on these matters. *See Wilson, supra* at 402-03; *Mahaffey*, 151 F.3d at 685; *Harris*, 949 F.2d at 1521 n.22. Finally, it further overlooks the substantial mitigating evidence

presented in this case from appellant's trial psychiatric experts and his family. In these circumstances we find no defective or inadequate assistance of counsel. *See Harris, supra* at 1524-25; *cf. Brewer v. Aiken*, 935 F.2d 850, 857-58 (7th Cir. 1991) (no investigation at all).

In this regard, the Supreme Court stated in *Strickland:*

> The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions. *See United States v. Decoster, supra,* [199 U. S. App. D. C.] at 372-373, 624 F.2d, at 209-10.

466 U.S. at 691, 104 S.Ct. 2052.

(2) Failure to challenge competence of psychiatrists

Appellant also chides his counsel for not challenging "the professional competence of the pretrial evaluations of appellant by the two forensic psychiatrists and" not ensuring "a complete and competent mental health evaluation of appellant was performed before trial." As noted earlier, we do not agree with appellant that he received inadequate psychiatric assistance prior to trial. Moreover, we also do not agree that his trial defense counsel was professionally inadequate in relying at trial on the work of three mental-status experts. *See Fitzgerald v. Greene*, 150 F.3d 357, 368-69 (4th Cir.), *cert. denied*, ___ U.S. ___ ,119 S.Ct. 389, 142 L.Ed.2d 321 (1998); *Waters v. Thomas*, 46 F.3d 1506 (11th Cir.), *cert. denied*, 516 ___ U.S. ___, 856, 116 S.Ct. 160, 133 L.Ed.2d 103 (1995); *Sidebottom v. Delo*, 46 F.3d 744, 752-54 (8th Cir.), *cert. denied*, 516 U.S. 849, 116 S.Ct. 144, 133 L.Ed.2d 90 (1995); *LaRette v. Delo*, 44 F.3d 681, 685-86 (8th Cir.), *cert. denied*, 516 U.S. 894, 116 S.Ct. 246, 133 L.Ed.2d 172 (1995); *O'Neal v. Delo*, 44 F.3d 655, 659-60 (8th Cir.), *cert. denied*, 516 U.S. 843, 116 S.Ct. 129, 133 L.Ed.2d 78 (1995); *Harris*, 949 F.2 at 1524-25.

(3) & (4) Failure to present available defense and adequate sentencing case

Finally, appellant attacks his counsel's decisions on strategy and tactics on both the merits of his guilt and the sentence. Hindsight in these matters is not usually countenanced by this Court or by the Supreme Court, which said in *Strickland*, 466 U.S. at 689-90, 104 S.Ct. 2052:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too

> tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. *Cf. Engle v. Isaac*, 456 U.S. 107, 133-134, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." *See Michel v. Louisiana, supra*, [350 U. S.] at 101 [76 S.Ct. 158]. There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. *See* Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U.L. Rev. 299, 343 (1983).

Therefore, appellant merits no relief on this issue. *See Wright*, F.3d at 162 (organic-brain-dysfunction evidence "is a double-edged sword that might as easily

have condemned [petitioner] to death as excused his actions"); *Thomas v. Gilmore*, 144 F.3d 513, 517 (7th Cir. 1998) (aspects of psychological mitigation evidence could be used by prosecutor as further evidence in aggravation), *cert. denied*, ___ U.S. ___, 119 S.Ct. 907, 142 L.Ed.2d 905 (1999).

ISSUE VII

WHETHER THE ARMY COURT OF MILITARY REVIEW ERRED BY REFUSING TO GRANT APPELLANT'S FUNDING MOTION OF AUGUST 7, 1991.

ISSUE VIII

WHETHER THE JUDGE ADVOCATE GENERAL OF THE ARMY (TJAG)'S MEMORANDUM DATED DECEMBER 17, 1992, DEPRIVED APPELLANT OF HIS RIGHT TO EQUAL PROTECTION IN VIOLATION OF THE FIFTH AMEND-MENT TO THE CONSTITUTION BE-CAUSE TJAG FAVORABLY CONSIDERED SIMILAR FUNDING REQUESTS IN THE ARMY'S TWO OTHER CAPITAL CASES, BUT ARBITRARILY DENIED APPELLANT'S REQUEST IN A SUMMARY MANNER.

ISSUE IX

WHETHER THE POLICY MEMORANDUM OF THE JUDGE ADVOCATE GENERAL OF THE ARMY DATED DECEMBER 17, 1992, DEPRIVES APPELLANT OF DUE PROCESS OF LAW IN

VIOLATION OF THE FIFTH, EIGHTH, AND FOUR-TEENTH AMENDMENTS.

The three issues assigned above address the refusal of the Court of Military Review and the Judge Advocate General to make available funding to the defense, post-trial, to hire a defense background investigator and a mental-health expert. Appellant asserts that the requested funding is necessary so a behavioral neurologist can personally and professionally examine him and determine the true extent of his organic brain damage discovered for the first time after his trial. He contends that such information is critical not only to the question of his mental responsibility at the time of the offense but as extenuation and mitigation evidence in his death-penalty case. He also contends that he was denied equal protection of the law under the Fifth Amendment (*see United States v. Tuggle*, 34 MJ 89, 92 (CMA 1992)) because the Judge Advocate General had previously granted such funding to two other death-row inmates.

At the outset we note that we are asked to review the Court of Military Review's decision denying *post-trial* psychiatric assistance and investigative services to appellant. *United States v. Tharpe*, 38 MJ 8 (CMA 1993); *United States v. Curtis*, 31 MJ 395 (CMA 1990). *Ake v. Oklahoma*, 470 U.S. 6, 105 S.Ct. 1087, 84 L.Ed.2d 538 (1985), however, was a trial-assistance case, and its standard for granting such assistance may not be appropriate in a post-trial setting. *See United States ex rel. Collins v. Welborn*, 868 F. Supp. 950, 989 (N.D. 111. 1994), *aff'd sub nom. Bracy v. Gramley*, 81 F.3d 684 (7th Cir. 1996), *rev'd on other grounds*, 520 U.S. 899, 117 S.Ct. 1793, 138 L.Ed.2d 97 (1997); *cf.* 21 USC § 848 (q)(4)(B) and q(9) (indigent federal defendants in collateral attack on death penalty entitled to reasonably necessary investigative or

expert services); *see Jackson v. Vasquez*, 1 F.3d 885, 888 (9th Cir. 1993); *Delong v. Thompson*, 790 F.Supp. 594, 617 (E.D.Va 1991), *aff'd*, 985 F.2d 553 (4th Cir. 1993). In any event he certainly is not entitled to a more generous standard; accordingly, review under the reasonable-necessity standard of *Ake*, *supra* at 8283, 105 S.Ct. 1087, and its progeny is appropriate. *See Tharpe*, *supra* at 14.

Turning first to the decision of the Court of Military Review, we note that it denied appellant's request for this assistance two times. *See* 37 MJ at 734-35. We also have denied this request. 34 MJ 164 (1991) and 40 MJ 25 (1994). To support his last request, appellant filed affidavits from a psychiatrist and a social worker asserting that appellant's pretrial evaluations were defective. Then he filed the results of certain psychiatric tests ordered by that same appellate court on December 31, 1991, which showed appellant had organic brain damage. 37 MJ at 742. Finally, he filed an affidavit from another psychiatrist, specializing in neurology, whose opinion was that appellant suffered "organic brain damage" and probably was not mentally responsible at the time of the charged offenses but further testing was required. Basically he argues that he has shown that the requested expert assistance is necessary as the Court of Military Review suggested it be shown in its earlier opinion of March 12, 1991. 32 MJ 730, 732-33.

Our standard of review in assessing a Court of Military Review decision denying funding for additional appellate expert mental health assistance is abuse of discretion. *See Tharpe*, *supra* at 16; *see also United States v. Nichols*, 21 F.3d 1016, 1017 (10th Cir.), *cert. denied*, 513 U.S. 1005, 115 S.Ct. 523, 130 L.Ed.2d 428 (1994); *United States v. Rinchack*, 820 F.2d 1557, 1563 (11th Cir. 1987). Here, we note that appellant had

already been personally examined by three psychiatric experts at trial, two of whom were personally chosen by the defense. *See Wright*, 151 F.3d at 163; *Martin v. Wainwright*, 770 F.2d 918, 935 (11th Cir. 1985), *cert. denied*, 479 U.S. 909, 107 S.Ct. 307, 93 L.Ed.2d 281 (1986). Four more psychiatric experts examined appellant post-trial as a result of a sanity board ordered by the Court of Military Review and the additional psychiatric testing also ordered post-trial by that court. They specifically addressed the question of appellant's organic brain damage and rejected it as negating his criminal responsibility. 37 MJ at 743. Appellant also had, in post-trial affidavit form, the defense expert opinions of Doctor Pincus, a neurologist, that he was not mentally responsible at the time of the offense, and of Doctor Merikangas that earlier evaluations by others were defective. *See* 770 F.2d at 934-35; *see Lawson v. Dixon*, 3 F.3d 743, 753 (4th Cir. 1993), *cert. denied*, 510 U.S. 1171, 114 S.Ct. 1208, 127 L.Ed.2d 556 (1994). Finally, he had the results of the testing ordered by the Court of Military Review which indicated organic brain damage of some type in appellant. *See Nichols*, 21 F.3d at 1018; *Shaw*, 762 F. Supp. at 862. Thus, the lower appellate court had a sufficient basis in the record for considering the mental-state issues before it and concluding that additional defense psychiatric expenditures were not reasonably necessary. *See Wright v. Angelone, supra; Martin*, 770 F.2d at 935 (numerous defense or independent evaluations already conducted justified denial of additional testing); *see also Vickers*, 144 F.3d at 616 (weight-of-prior-evidence standard).

Appellant further attacks the decision of the Acting Judge Advocate General on August 19, 1993, refusing to consider his post-trial request for funding for expert assistance. He complains that he was

denied equal protection of the law because the Judge Advocate General had granted equally meritorious requests for funding in September and December of 1992 from two equally deserving death-row inmates. He also complains that TJAG's adherence to a new policy not to consider the merits of such requests unfairly burdened his access to the courts and denied him due process of law. We disagree.

In *United States v. Curtis*, 31 MJ 395 (1990), this Court ordered the Judge Advocate General to provide adequate assistance to a capital defendant "to properly litigate the unique constitutional issues . . . which, indeed, affect the litigation of matters relating to imposition of the death penalty in each of the uniformed services." This Court directed that $15,000 be made available to appellate counsel and

> [t]hat the expenditure of such funds shall be approved by the same [appellate defense counsel] or his designee for such expenses as are determined by him to be reasonable and necessary in furtherance of the defense of the appellant in this appellate proceeding, subject to such procedures as are in effect within the Department of the Navy for the proper disbursement of public funds; [and]
>
> That the determination of such reasonable and necessary expenditures shall be subject to review only by this Court[.]

In 1992, without a court order, the Judge Advocate General of the Army made funding available to two other death-row inmates whose cases were on appeal.

On December 17, 1992, the Judge Advocate General of the Army issued the following memorandum on his policy covering all future requests for funding of experts:

SUBJECT: Fee Requests for Expert Services and Related Purposes in Capital Cases

1. Purpose. This memorandum provides policy guidance concerning fee requests for expert services and related purposes, which are submitted to The Judge Advocate General.

2. Policy.

a. The Judge Advocate General will not approve, nor consider on the merits, requests for funds to obtain expert services or for related purposes. Moreover, The Judge Advocate General will not consider, *ex parte,* matters submitted in support of such requests.

b. Such requests for funding should be made to the appropriate authorities. Appropriate authorities include courts and convening authorities.

(1) The appropriate court is the court before which the case is currently pending. This would be the trial court (after referral but before authentication of the record of trial by the military judge) or the appellate court (the United States Court of Military Appeals or the United States Army Court of Military Review, as appropriate).

(2) The appropriate convening authority is the convening authority who presently exercises general courtmartial jurisdiction over the accused/appellant.

3. Nothing in this policy is intended to diminish the legal authority of The Judge Advocate General to grant requests for funds for expert services and related purposes.

On August 19, 1993, the Acting Judge Advocate General of the Army issued the following memorandum in response to appellant's renewed request for expert funding:

> SUBJECT: *Ex Parte* Request for Expert Assistance, *United States v. Specialist Ronald A. Gray*, 261-69-7258, ACMR 8800807, CMA 93-7001/AR
>
> 1. Your 9 August 1993 request, subject as above, is denied.
>
> 2. Pursuant to the policy established by The Judge Advocate General on 17 December 1992, fee requests for expert services and related purposes in capital cases are no longer considered on their merits or approved by The Judge Advocate General.
>
> 3. This policy does not act to deny your client access to funds when those funds are deemed warranted by the appropriate authorities. Appropriate authorities include the court presently hearing your client's case and the General Court-Martial Convening Authority. This policy was implemented to avoid interference by this office with the orderly functioning of the appellate process, and to avoid duplicating a function traditionally carried out by others.
>
> 4. Before 17 December 1992, there was no OTJAG policy regarding consideration of fee requests in capital cases. Apparently, the requests in *U.S. v. Loving* and *U.S. v. Murphy* were the first such requests addressed to this office, and the issue of our funding these requests was a novel one. With considerable

> reluctance, fees were approved by The Judge Advocate General in the *Loving* and *Murphy* cases. After our experience dealing with those requests, however, we concluded that it was not conducive to an orderly appellate process for this office to intervene and determine issues regarding fees during the appeal of capital cases. *We perceived no beneficial effect from duplicating a function adequately addressed by authorities already empowered to consider such requests for funding. Despite the 17 December 1992 policy, no litigant is left without funding when warranted by the law and facts of the case.*
>
> 5. Although your request for funds provided by The Judge Advocate [sic] is denied, you have not been prevented from addressing requests to traditional authorities for considering funding requests. My denial is not based on an assessment of the merits of the request for witness funding in your client's case, but is made in accordance with established policy. That policy affects not only your client's request, but similar requests submitted by all appellants in capital cases after 17 December 1992.

(Emphasis added.)

Appellant's equal protection argument is clearly without merit. The Equal Protection Clause is generally designed to ensure that the Government treats "similar persons in a similar manner." *See generally* R. Rotunda and J. Nowak, *Treatise on Constitutional Law: Substance and Procedure*, 2d § 18.38 at 488; § 18:41 at 495 (1992). As then-Chief Judge Everett, writing for this Court in *United States v. Means*, 10 MJ 162, 165 (1981), said:

> For the Government to make distinctions does not violate equal protection guarantees unless constitutionally suspect classifications like race, religion, or national origin are utilized or unless there is an encroachment on fundamental constitutional rights like freedom of speech or of peaceful assembly. The only requirement is that reasonable grounds exist for the classification used. *Cf. Oyler v. Boles*, 368 U.S. 448, 82 S.Ct. 501, 7 L.Ed.2d 446 (1962); *United States v. Batchelder*, 442 U.S. 114, 99 S.Ct. 2198, 60 L.Ed.2d 755 (1979).

We do not consider death-penalty inmates who submit requests for expert assistance after 1992 as being a suspect class. We also do not consider the action of the Judge Advocate General in establishing a *Curtis*-type procedure for dispensing expert assistance in the Army as unreasonable. *See United States v. Curtis*, 31 MJ 395 (CMA 1990). Finally, we hold that the action of the Judge Advocate General in *Loving* and *Murphy* did not create any fundamental constitutional right for capital defendants to initially request him to provide such funding.

Appellant's due process argument is also without merit. In substance he contends that the Judge Advocate General's policy of refusing to entertain future requests for expert and investigative assistance infringed his right to access the courts and process his appeal. *See generally Bounds v. Smith*, 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977). We disagree.

The Judge Advocate General's policy letter does not purport to deny appellant or any other service member expert assistance on appeal. Moreover, it does not suggest that the Judge Advocate General will refuse to make such funds available if so ordered by a competent court. *See*

United States v. Curtis, supra. It does, however, establish a procedure by which a soldier's request for funding will be forwarded to the appropriate forum for consideration and action in a more efficient manner. *Cf.* Art. 73. Such a policy or procedure is reasonable in our view and does not deny appellant due process of law. *See DeLong*, 790 F. Supp. at 617, citing *United States v. Goodwin*, 770 F.2d 631 (7th Cir. 1985), *cert. denied*, 474 U.S. 1084, 106 S.Ct. 858, 88 L.Ed.2d 897 (1986).

ISSUE X

WHETHER THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT BY ALLOWING THE GOVERNMENT TO USE APPELLANT'S STATEMENT MADE PURSUANT TO A GUILTY PLEA IN A CIVILIAN TRIAL, WHERE (1) CIVILIAN AUTHORITIES FAILED TO ADVISE APPELLANT OF HIS FIFTH AMENDMENT RIGHT AGAINST SELFINCRIMINATION PRIOR TO ELICITING INCRIMINATING INFORMATION UNRELATED TO HIS CIVILIAN PLEA; (2) THE PARTIES DID NOT CONTEMPLATE USE OF THE STATEMENT UNLESS APPELLANT PLED GUILTY AT THE CIVILIAN TRIAL; (3) MILITARY DEFENSE COUNSEL WERE NOT PRESENT WHEN THE STATEMENT WAS RENDERED: AND (4) CIVILIAN DEFENSE COUNSEL SHOULD HAVE KNOWN THAT MILITARY AUTHORITIES HAD PREFERRED CHARGES AGAINST APPELLANT, WITH A VIEW TOWARD THE DEATH PENALTY, ON AUGUST 5, 1987.

ISSUE XI

WHETHER THE MILITARY JUDGE ERRED BY ALLOWING THE GOVERNMENT TO MAKE USE OF APPELLANTS STATEMENTS IN VIOLATION OF A CIVILIAN PLEA AGREEMENT.

ISSUE XII

WHETHER THE OPINION OF THE ARMY COURT WHICH FOUND THAT APPELLANT'S STATEMENTS DID NOT CONTRIBUTE TO THE FINDINGS AND SENTENCE MISINTERPRETS AND MISAPPLIES THE FACTS OF RECORD.

ISSUE XIII

WHETHER CIVILIAN AND MILITARY DEFENSE COUNSEL WERE INEFFECTIVE IN FAILING TO LIMIT APPELLANT'S CONFESSION MADE PURSUANT TO A CIVILIAN PLEA AGREEMENT, OR IN FAILING TO DRAFT TERMS LIMITING THE USE OF SUCH STATEMENT TO THE CIVILIAN TRIAL.

The four granted issues noted above are all directed to appellant's pretrial statements to North Carolina police officers on November 2 and 4, 1987. In these statements appellant admitted burglarizing the Miskanin trailer and taking a .22 caliber pistol and a VCR which he later pawned. He also admitted that he had this pistol in his possession "as late as" December 1986, around the time of the murder of Ms. Vickery-Clay. The prosecution at his court-martial

called Detective Oakes to the stand to establish that appellant made these statements. The same .22-caliber pistol was found at the murder site of Laura Lee Vickery-Clay. The prosecution used all this evidence to show that appellant burglarized the Miskanin trailer as charged and as "circumstantial evidence" identifying him as the murderer of Ms. Vickery-Clay.

Appellant objected to admission of evidence of his pretrial statements at trial but the military judge ruled against him. The following colloquy occurred:

> MJ: The motion to suppress the out-of-court statements of the accused rendered on the 2d and 4th of November, with regard to certain portions of those statements is denied. I specifically find that on the 6th of January—or the 7th of January, the accused was advised of his rights pursuant to *Miranda* [*v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)]; that indeed, on the 13th of January, as represented by counsel, he exercised those rights; while there was a considerable passage of time between then and the 2d of—the 27th of September when the statement was actually rendered, there were no factors tending to indicate that the accused had in any way not recalled his right to remain silent, and indeed rendered the statements in the presence of his counsel and his counsel frequently, as reflected within the statements, interjected herself as the civilian counsel in the discussion and thereby, on behalf of the accused, exercised the right to remain silent; that indeed, as the Government suggests, the effect of the offer by on behalf of the accused through counsel was

an effective waiver of any such right to remain silent, prompted by his desire for the benefit of the transaction—the agreement that he reached; that in any event, it would have been a waiver.

Now, as to the portion or the portions of the statements rendered admissible by that ruling, contrary to the—and while I appreciate the significance perceived by the Government, contrary to the assertions of the Government, I perceive the admissions—or the statements relating to the actual shooting of the - Wilson, I believe her name was, with a .22-caliber pistol to be unduly prejudicial and is overly suggestive.

Accordingly, any type of statements or any evidence provided by the witnesses pertaining to these admissions will pertain solely to the .22-caliber pistol, the statements of the accused regarding it and its larceny or removal from the residence of Sergeant Miskanin, if, indeed, that can be established, even that much is not readily apparent from the statements, inasmuch as the residence is not identified, if my memory serves me, within the statements, but rather, the parties doing the discussion at the time assumed that they were talking about a given residence. Counsel for both sides understand what I've said? If not, I'll clarify it.

DC: (Nodding in the affirmative) Understand.

MJ: I don't want a nod of your head. I want to know.

DC: Understand, yes, sir.

TC: Sir, I understand what you said. I wish to inquire of the court whether we can elicit testimony concerning the fact that the accused had admitted possession—or having in his possession the .22-caliber pistol on the Ilth of December—

MJ: Within the realm of that statement.

TC: —along with his admission that he had in fact hidden the .22-caliber pistol—

MJ: Anything pertaining to the possession, within the statement, of the .22-caliber pistol—how he obtained it, if it's the same one, and what he may have done with it in terms of hiding it, but not in terms of shooting Wilson.

TC: Understood, sir.

We initially note that appellant is correct in asserting that the Court of Military Review erred in stating that appellant's pretrial statements "were never brought to the attention of the court members. . . ." and therefore could not have prejudiced appellant on findings and sentence. 37 MJ at 740-41. It is true that his guilty pleas to the two murders prosecuted in state court which gave rise to these statements were not presented to the members of his court-martial. Moreover, the actual written statements given to state authorities concerning these offenses were not admitted at his court-martial. However, as noted above, Detective Oakes did testify as to the fact that such statements were made by appellant.

Nevertheless, the question before us is whether admission of evidence of these statements by appellant was legal error. The Court of Military Review found no legal error, and we agree.

(1) Violation of Fifth Amendment

Appellant first argues that his statements made pursuant to his guilty pleas in state court were erroneously admitted because "civilian authorities failed to advise appellant of his Fifth Amendment right against self-incrimination prior to eliciting incriminating information unrelated to his civilian plea." Final Brief at 109. Initially, we note that the .22-caliber pistol taken from the Miskanin trailer was the same pistol used to kill Tammy Wilson, a crime to which he agreed to plead guilty in state court. The fact that questioning about this offense also touched on a matter relevant to his military offenses did not require more specific advice. *See Colorado v. Spring*, 479 U.S. 564, 576-77, 107 S.Ct. 851, 93 L.Ed.2d 954 (1987). Moreover, as noted by the military judge, appellant was advised of his rights against self-incrimination under the Fifth Amendment, invoked his right to counsel, consulted with counsel, and agreed to provide information to state police concerning the murder of Tammy Wilson. Finally, appellant's civilian defense counsel was present with appellant at the time he made his statements to police and later to the court. *See generally* 1 W. LaFave and J. Israel, *Criminal Procedure* § 6.8 at 519 (1984) ("It is generally accepted that if the attorney was actually present during the interrogation, then this obviates the need for the warnings."). Accordingly, we conclude that these statements were not admitted in violation of the Fifth Amendment. *See generally United States v. Arrington*, 73 F.3d 144, 149-50 (7th Cir. 1996); *see also United States v. Benson*, 640 F.2d 136, 139 (8th Cir. 1981).

(2) Use of statements as violation of state plea agreement

Appellant next argues that evidence of these statements was erroneously admitted by the judge

because their use at his court-martial violated his civilian plea agreement. Guilty pleas and accompanying statements in one jurisdiction are generally admissible in other jurisdictions to prove the element of other crimes. *United States v. Williams*, 104 F.3d 213, 216 (8 th Cir. 1997); *United States v. Benson, supra; United States v. Howze*, 668 F.2d 322, 324 n.3 (7th Cir. 1982). The civilian plea agreement in this case does not otherwise preclude use of his statements in a subsequent court-martial for different offenses. The Agreement only states, "In the event that the above plea arrangement is not carried out for whatever reason, no statement made by the Defendant pursuant to this agreement will be used against him in any subsequent prosecutions." App. Ex. XLVIII at 14. Appellant's suggestion that the agreement implies a limited use in state proceedings is simply unsupported by this record of trial.

(3) Violation of Article 31

Appellant next argues that evidence of his statements was erroneously admitted at his court-martial in violation of Article 31, UCMJ, 10 USC § 831. He contends that his investigation for murders in the Fayetteville area by civilian and military police had "merged" within the meaning of the case law of this Court. Accordingly, he concludes that Article 31 warnings had to be given by civilian police when they questioned him about the offenses tried later in the court-martial. We disagree.

The premise of appellant's Article 31 argument is that the civilian and military investigations "merged" within the meaning of *United States v. Lonetree*, 35 MJ 396, 403 (CMA 1992), *cert. denied*, 507 U.S. 1017, 113 S.Ct. 1813, 123 L.Ed.2d 444 (1993). However, we note that appellant's original motion to suppress his pretrial

statements to civilian police made only a vague reference to Article 31. *See* App.Ex. XLVII. Moreover, no attempt to develop a proper factual basis for suppression on Article 31 grounds was made by the defense at the court-martial. Finally, both on questioning by the military judge (R. 353) and in his argument on the motion to suppress, defense counsel made clear that the basis of his motion to suppress was solely the Fifth Amendment and *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). In this context we find no plain error under Article 31 in admission of those statements.

(4) Ineffective Counsel

Appellant finally contends that he was denied effective assistance of counsel at his court-martial as guaranteed by the Sixth Amendment. He grounds his argument on conduct of his civilian defense counsel at his earlier state criminal trial for other murder charges which caused or permitted him to incriminate himself on the military offenses. He also cites his military defense counsel's failure to intervene in the earlier state proceedings and prevent this self-incrimination.

The thrust of appellant's argument is that an accused facing different charges in both state and military courts is entitled to a coordinated and unified defense, especially where he might receive the death penalty for his crimes in either forum. He has cited no authority for this proposition, other than general ineffective-assistance-of-counsel cases such as *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

Appellant particularly contends that his civilian defense counsel at his North Carolina trial should not have

permitted him to admit as part of his guilty plea to state murder charges that he burglarized the Miskanin trailer in November of 1986, and stole a .22-caliber pistol. He notes that charges for burglary of the Miskanin residence and larceny of the pistol were pending referral to court-martial at the time of his admission in the State case. He further notes that he was later convicted of these offenses at his courtmartial on the basis of this admission. Also, he notes that the charge of murdering Ms. Vickery-Clay was also pending court-martial at the time of this admission and that he was convicted of that offense based upon his admission at the State trial. In this regard, we note that a .22-caliber pistol taken from the Miskanin residence was shown at the court-martial to be the same pistol found at the murder scene of Ms. Vickery-Clay. He finally asserts that his military defense counsel in this case who attended the State court proceedings should have attempted to intervene and preclude these admissions.

We reject appellant's ineffective-assistance-of-counsel claim for several reasons. First, the burden is on him to show deficient professional conduct by his counsel and prejudice resulting from such conduct. *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052. Moreover, in showing less than reasonably competent conduct by counsel, "it is necessary to 'judge . . . counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct.'" *Lockhart v. Fretwell*, 506 U.S. 364, 371, 113 S.Ct. 838, 844, 122 L.Ed.2d 180 (1993), quoting *Strickland, supra* at 690, 104 S.Ct. 2052. Finally, the Supreme Court has recognized that "[s]heer outcome determination, [. . .], was not sufficient to make out a claim under the Sixth Amendment." 506 U.S. at 370, 113 S.Ct. 838.

Appellant did not challenge admission of his state-trial guilty-plea statements at his court-martial on Sixth

Amendment grounds. He also did not call civilian defense counsel to explain his reasoning, the advice which he gave to appellant, or any awareness which he had as to the significance of these guilty-plea statements in a future court-martial. Here, the facts on the record were that civilian defense counsel avoided the death penalty in state court for two murder charges and he knew that appellant faced a possible capital court-martial referral for two other murder charges and related offenses. The record also shows that, at appellant's questioning, civilian defense counsel successfully objected to references in the questions to offenses under investigation by military authorities. We find no unreasonable professional conduct in these circumstances. *See Lane v. Singletary*, 44 F.3d 943 (11th Cir.), *cert. denied*, 515 U.S. 1163, 115 S.Ct. 2619, 132 L.Ed.2d 861 (1995); *see generally Bordenkircher v. Hayes*, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978).

Assuming appellant established constitutional error with respect to his Sixth Amendment right to counsel, we would still not reverse his convictions for burglary, robbery, and the Vickery-Clay murder on this basis. *See generally Lockhart*, 506 U.S. at 369 n.2, 113 S.Ct. at 842 n.2. The record in this case established beyond a reasonable doubt that any such error was harmless.

First, we note that appellant's admission that he took a .22-caliber pistol from the Miskanin trailer and possessed it around December 11, 1986, falls far short of a full confession to the Miskanin burglary on November 12, 1986, and the murder of Ms. Vickery-Clay 4 days later. *Cf. Arizona v. Fulminante*, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). Second, appellant's admissions to taking the .22-caliber pistol from the Miskanin trailer was not the only evidence linking him to the burglary of that residence and the murder of Ms.

Vickery-Clay. It was also established that appellant pawned a VCR taken with the pistol from the Miskanin trailer. Moreover, he was linked to the murder of Ms. Vickery-Clay by fingerprints and fiber evidence. In this context, the Government has persuaded us that any error by civilian defense counsel in failing to limit appellant's guilty-plea statements in the North Carolina trial was harmless beyond a reasonable doubt in his court-martial.

ISSUE XIV

WHETHER APPELLANT WAS DENIED A FAIR TRIAL BY AN IMPARTIAL COURT-MARTIAL PANEL IN VIOLATION OF THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS DUE TO PREJUDICIAL PRETRIAL PUBLICITY.

Appellant next attacks his conviction and death sentence on the basis that his courtmartial panel was saturated with prejudicial pretrial publicity *(see Rideau v. Louisiana,* 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963)) and the military judge failed to take necessary steps to protect his right to a fair and impartial jury. *See Chandler v. Florida,* 449 U.S. 560, 101 S.Ct. 802, 66 L.Ed.2d 740 (1981). He notes that 93 articles were published in five newspapers for over 14 months concerning appellant's civilian and military trials which "essentially convicted appellant prior to his court-martial." Final Brief at 144. He further notes that the military judge failed to grant timely motions by the defense to neutralize this publicity. "Timely motions were made to: sequester the members, or in the alternative, exclude the media; change the location (venue) of the court-martial; direct the convening authority to detail all the members

from another command outside the 82d Airborne Division, or in the alternative, detail six additional members from a location other than Fort Bragg." Final Brief at 149-50.

To legally support his pretrial-publicity claim, appellant relies heavily on the Fifth Circuit decision in *Mayola v. State of Alabama*, 623 F.2d 992 (1980), *cert. denied*, 451 U.S. 913, 101 S.Ct. 1986, 68 L.Ed.2d 303 (1981). There, that court stated:

> II. *Prejudicial Pretrial Publicity*
>
> One seeking to have his conviction nullified on the ground that he was denied a fair trial to an impartial jury due to adverse pretrial publicity *ordinarily* must demonstrate an actual, identifiable prejudice attributable to that publicity on the part of members of his jury. *Irvin v. Dowd*, 366 U.S. 717, 723, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751 (1961); *United States v. Capo*, 595 F.2d 1086, 1090 (5th Cir. 1979), *cert. denied*, 444 U.S. 1012, 100 S.Ct. 660, 62 L.Ed. 2d 641 (1980); *Hale v. United States*, 435 F.2d 737, 746-47 (5th Cir. 1970)[,] *cert. denied*, 402 U.S. 976, 91 S.Ct. 1680, 29 L.Ed.2d 142 (1971).

623 F.2d at 996 (emphasis added).

That Court, however, also recognized that an exception to the rule requiring a showing of actual prejudice was established by the Supreme Court in *Rideau v. Louisiana, supra.* The Court said:

> The principle distilled from this holding by courts subsequently discussing the case is that where a petitioner adduces evidence of inflammatory, prejudicial pretrial publicity that so pervades or saturates the community as to

> render virtually impossible a fair trial by an impartial jury drawn from that community, "Jury] prejudice is presumed and there is no further duty to establish bias." *United States v. Capo*, 595 F.2d at 1090. *E.g., Murphy v. Florida*, 421 U.S. 794, 798-99, 95 S.Ct. 2031, 2035-2036, 44 L.Ed.2d 589 (1975); *United States v. Haldeman*, 559 F.2d at 60-61 *McWilliams v. United States*, 394 F.2d 41, 44 (8th Cir. 1968), *cert. denied*, 393 U.S. 1044, 89 S.Ct. 643, 21 L.Ed.2d 593 (1969); *Pamplin v. Mason*, 364 F.2d 1, 4-5 (5th Cir. 1966). *See also, e.g., Jenkins v. Bordenkircher*, 611 F.2d 162, 165 (6th Cir. 1979) (reciting equivalent standard without referring to *Rideau* itself). These courts have held that where the *Rideau* principle applies, the petitioner clearly need not show that the pervasive community prejudice actually entered the jury box, *Pamplin v. Mason*, 364 F.2d at 5, and some circuits have indicated that the petitioner need not even demonstrate that the members of the jury panel or venire were, themselves, actually exposed to the publicity, *e.g. McWilliams v. United States*, 394 F.2d at 44.

623 F.2d at 997. Appellant asserts his case was like *Rideau.*

To establish presumed prejudice, the record must demonstrate "that the community where the trial was held was saturated with prejudicial and inflammatory media publicity about the crime[s]." *See Troiani v. Poole*, 858 F.Supp. 1051, 1062 (S.D. Cal. 1994). Here, we note that the challenged 93 articles by 5 different papers did not cover a single crime, a single investigation, or a single trial. Instead, they addressed a veritable crime

spree, involving five murders, six rapes, and attendant lesser crimes. Moreover, they covered dual investigations and trials by state and military authorities. Appellant's gross-statistical-saturation argument ignores this context and, to that extent, is unpersuasive.

In any event, we are not persuaded by appellant that the pretrial publicity in his case was prejudicial and inflammatory. This is simply not a case like *Rideau*, where the defendant's uncounseled pretrial confession was broadcast three times on television before his trial. Here, the articles appear to be no more than routine reports of heinous crimes, investigation of these crimes, the arrest of appellant, and the preliminary steps taken to bring appellant to trial in both state and military courts. These articles do not appear to be unduely sensationalistic. *See Rock v. Zimmerman*, 959 F.2d 1237, 1253 (3d Cir.), *cert. denied*, 505 U.S. 1222, 112 S.Ct. 3036, 120 L.Ed.2d 905 (1992). Moreover, they clearly do not create any actual unfairness to appellant as a defendant in the sense delineated in *Rideau*. *See United States v. DiSalvo*, 34 F.3d 1204, 1222 n.16 (3d Cir. 1994); *cf. Mayola*, 623 F.2d at 997-98.

Appellant's remaining argument is that the military judge failed in his duty to ensure that he receive a fair trial. *See generally Chandler v. Florida*, *supra*. The military judge was in fact aware of the pretrial publicity surrounding appellant's case, but he did reject the defense-proffered solutions to this problem. However, the military judge did permit extensive *voir dire* of the panel members concerning exposure to pretrial publicity and its possible impact on deliberations in this case. He also instructed the members not to "expose" themselves to any particular

information pertaining to the accused and instructed the members to use "common sense" in dealing with media exposure. Finally, he twice ruled that the members of this court-martial were impartial in fact. We see no abuse of discretion by the judge in these matters.

ISSUE XV

WHETHER THE MILITARY JUDGE FAILED TO PROPERLY DETERMINE, AND THE EVIDENCE OF RECORD FAILS TO CONCLUSIVELY DEMONSTRATE, THAT APPELLANT'S ELECTION AS TO FORUM WAS KNOWINGLY AND INTELLIGENTLY MADE.

The factual basis for this issue is appellant's apparent signing of his request for a court-martial panel composed of at least one-third enlisted members with the words "Negative Reading." Appellant submitted his request so signed after twice being advised of his forum rights by the military judge and orally electing trial by enlisted members. At the urging of his counsel, he later signed his proper name above the words "Negative Reading."

We further note that the military judge did not accept appellant's request without his proper signature. The record states:

> ACC: (confers with defense counsels) I will accept —
>
> MJ: No, you won't accept. You'll elect. You'll either elect by officer members, or a court that includes enlisted members.
>
> ACC: I will elect enlisted members. [Defense counsel begins to return document to the judge]

MJ: Wait a minute, leave that there. You have there before you a written request for enlisted members. On that appears your typed signature block, and above it what appears to be your signature. Is that your signature?

ACC: (Examining document) No, that's not my name.

MJ: Let me see that (receives document from defense counsel/examining document) What is that supposed to be?

DC: He's confused, Your Honor.

MJ: Well, let's un-confuse him.

[Defense counsel hands document to accused, who signs it, and defense counsel returns it to the judge.]

MJ: The record should reflect the accused has just now signed the written request for enlisted members.

Appellant asserts that the above record suggests that appellant did not understand his rights and was coerced by defense counsel to elect trial with enlisted members. We disagree. There is no question in this case that appellant understood his choice of forum rights and he voluntarily exercised it. *See* 37 MJ at 738. The military judge twice explained those rights to appellant, appellant twice acknowledged understanding those rights; and finally, appellant requested enlisted members both orally and in writing. *United States v. Barnes*, 8 MJ 115, 117 (CMA 1979); *United States v. Stegall*, 6 MJ 176, 177 (CMA 1979). Appellant's decision to submit his request signed "Negative Reading" rather than his proper name suggests confusion as to his name, not his right to choose a forum. The military judge's decision to permit counsel to

have a reasonable opportunity to rectify this problem was not error. *See* RCM 801(a)(3).

XVI

WHETHER APPELLANT WAS DENIED DUE PROCESS UNDER THE FIFTH AND FOURTEENTH [3] AMENDMENTS TO THE UNITED STATES CONSTITUTION AND MILITARY DUE PROCESS WHEN THE MILITARY JUDGE DENIED RESOURCES NECESSARY TO RETAIN EXPERT SERVICES IN CRIMINAL INVESTIGATION TO ASSIST THE DEFENSE IN THE EVALUATION, PREPARATION, AND PRESENTATION OF ITS DEFENSE.

Prior to trial, appellant twice requested the convening authority to provide an independent criminal investigator to assist in the preparation of his defense. The convening authority did not grant this request but he did make available the services of the Criminal Investigation Command (CID) who to a certain extent investigated the matters requested by the defense. At trial the defense renewed its "request" for an independent criminal investigator, noting three areas which had not been investigated to its satisfaction. The military judge denied this "request."

Citing the decisions of this Court in *United States v. Garries*, 22 MJ 288, *cert. denied*, 479 U.S. 985, 107 S.Ct. 575, 93 L.Ed.2d 578 (1986), and *United States v. Mustafa*, 22 MJ 165, *cert. denied*, 479 U.S. 953, 107 S.Ct. 444, 93 L.Ed.2d 392 (1986), counsel argue that the military judge abused his discretion in denying his

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[3] The Fourteenth Amendment only applies to the States.

request for an independent criminal investigator. He asserts that his motion "was made at trial as a result of the failure of government investigators (CID special agents) to adequately provide the defense with critical information necessary for the formation of appellant's defense." Final Brief at 157. He particularly states:

> Appellant enumerated three areas to the military judge: 1) The failure of CID to provide the names and locations of all Terminal Taxi Cab Company drivers on duty at the time of Kim Ruggles' death; 2) the failure of CID to sufficiently coordinate with North Carolina and/or other federal law enforcement agencies, *e.g.*, the Drug Enforcement Agency [sic] (DEA), concerning the existence of a dark colored Lincoln automobile allegedly used in a drug transaction that Kim Ruggles was a party to on the night of her death; and 3) the failure of CID to contact the family, employer, and acquaintances of Tommy D. Arrington, a suspect in both murders who bears a strong resemblance to appellant, to ascertain Arrington's location on relevant dates. (R. at 159-61; App. Exh. XXXVII.)

Final Brief at 157-58. He concludes that "[n]one of the aforementioned areas were adequately investigated by CID." Final Brief at 158.

It is beyond cavil in the military justice system that an accused has a right to investigative assistance at the expense of the Government if he demonstrates the necessity for such assistance. *United States v. Robinson*, 39 MJ 88 (CMA 1994); *United States v. Kelly*, 39 MJ 235 (CMA), *cert. denied*, 513 U.S. 931, 115 S.Ct. 324, 130 L.Ed.2d 284 (1994). In *United States v. Gonzalez*, 39 MJ 459, 461, *cert. denied*, 513 U.S. 965, 115

S.Ct. 429, 130 L.Ed.2d 342 (1994), this Court recognized a three-step test for determining necessity, as follows:

> First, why the expert assistance is needed. Second, what would the expert assistance accomplish for the accused. Third, why is the defense counsel unable to gather and present the evidence that the expert assistant would be able to develop.

We review a military judge's decision on providing expert assistance on an abuse-of-discretion standard. *See United States v. Washington*, 46 MJ 477, 480 (1997); *see also United States v. Gadison*, 8 F.3d 186, 191 (5th Cir. 1993); *United States v. Sanchez*, 912 F.2d 18, 22 (2d Cir. 1990). Here, the military judge denied the requested expert assistance because he determined that the letter of the CID commander adequately responded to appellant's inquiries in the three areas noted.

To appellant's request for the taxi-driver information, the CID commander stated:

> 3. CPT BREWER requested that Terminal Taxi logs be researched to determine which drivers were working during the hours of 1800-2200 on the night of RUGGLES' death and their whereabouts be determined during that period. All of the taxi drivers were located, except for Mr. CRUMBLE, who was driving a Terminal owned taxi which was sub-leased to Christian Taxi Company, Fayetteville, NC. The only taxi driver known to have been in the area in which RUGGLES' was murdered was Mr. James FAUST, 309 Capital Drive, Spring Lake, NC, who stated that he had stopped along No Name Rd about dusk on 6 Jan 87 to attempt to help a disabled vehicle. FAUST was unable to remember who was with him in

the taxi or who was in the vehicle he stopped to assist. All other drivers related that they had not been around the No Name Rd area of Ft Bragg, NC on the night of 6 Jan 87.

4. CPT BREWER requested that all drivers from Terminal Taxi be questioned as to whether they carried any passengers that fit the description given by SSG GRISBY and PVT STEPHENS. None of the drivers could remember whom they had in their taxis on 6 Jan 87.

To appellant's request for information on the dark Lincoln, he stated:

6. CPT BREWER requested that law enforcement agencies along Interstate 95 and Interstate 75 from Miami, FL to Maine and Naples FL to Michigan be contacted to determine if from Jan 87 to Oct 87 they arrested or received information pertaining to drug dealers who are black males and drove a dark Lincoln. A message was dispatched to the appropriate units, but no information concerning any individuals fitting the above description was obtained.

Finally, as to the Tommy-Arrington request, he stated:

8. CPT BREWER requested that the appropriate authorities in the Nash County Sheriff's Office and the Rocky Mount Police Department be contacted to determine if Tommy D. ARRINGTON's whereabouts on the times and dates of the crimes SP4 GRAY is currently charged with, can be determined. Further, CPT BREWER requested that blood and saliva samples be obtained from ARRINGTON. The Nash County Sheriff's

> Department and the Rocky Mount police Department did not have any information concerning ARRINGTON's whereabouts. Mr. ARRINGTON was interviewed but could not determine his whereabouts on these dates. A blood and saliva sample was obtained and sent to USACIL-CONUS.

In our view, appellant has confused his right to *necessary* investigative assistance with an unrestricted right to search for any evidence which might be relevant in his case. Here the CID went beyond defense counsel's request and questioned all the drivers from Terminal Taxi. It also contacted appropriate police units along I-95 concerning the dark Lincoln as requested by defense counsel. Finally, it contacted Tommy Arrington and local police investigating him. Simply because the results of these inquiries were not helpful to the defense does not render these efforts ineffective or provide a concrete explanation for further assistance. *See Castro v. Ward*, 138 F.3d 810, 827 (10th Cir.), *cert. denied*, __ U.S. __, 119 S.Ct. 422, 142 L.Ed.2d 343 (1998); *Goodwin*, 770 F.2d at 635. Accordingly, we conclude that a substantial basis existed for the judge to deny further expert assistance to appellant.

ISSUE XVII

WHETHER THE MILITARY JUDGE VIOLATED APPELLANT'S RIGHT TO DUE PROCESS BY IMPROPERLY GRANTING THE GOVERNMENT CHALLENGE FOR CAUSE AGAINST MSG McCORMICK BASED UPON THAT MEMBER'S OPPOSITION TO THE DEATH PENALTY, WHERE MSG McCORMICK NEVER INDICATED THAT HE WAS

"IRREVOCABLY COMMITTED . . . TO VOTE AGAINST THE DEATH PENALTY REGARDLESS OF THE FACTS AND CIRCUMSTANCES. *SEE GRAY V MISSISSIPPI*, 481 U.S. 648 (1987).

ISSUE XVIII

WHETHER THE MILITARY JUDGE IMPROPERLY GRANTED THE GOVERNMENT CHALLENGE FOR CAUSE AGAINST CSM WOODS.

Appellant argues that the military judge improperly granted two government challenges against detailed members of his court-martial because of their opposition to the death penalty. He relies on the Supreme Court decision in *Gray v. Mississippi, supra,* and asserts that neither MSG McCormick nor CSM Woods was "irrevocably committed ... to vote against the death penalty regardless of the facts and circumstances that might emerge in the course of the proceedings." Final Brief at 160. The Court of Military Review held that the correct "standard is whether the member's views would 'prevent or substantially impair the performance of his duties as a juror . . . .' *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S.Ct. 844, 852, 83 L.Ed. 2d 841 (1985) (quoting *Adams v. Texas*, 448 U.S. 38, 45, 100 S.Ct. 2521, 2526, 65 L.Ed.2d 581 (1980)); *see also Morgan v. Illinois*, 504 U.S. 719, 112 S.Ct. 2222, 119 L.Ed. 2d 492 (1992); *United States v. Curtis*, 33 MJ 101, 107 (CMA 1991.) " 37 MJ at 736-3 7.

Appellant's argument is based on a faulty legal premise. The Supreme Court in *Gray*, 481 U.S. at 657-58, 107 S.Ct. 2045, addressed this question definitively:

> In *Witherspoon*, this Court held that a capital defendant's right, under the Sixth and Fourteenth Amendments, to an impartial jury

prohibited the exclusion of venire members "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." 391 U.S. at 522, 88 S.Ct., at 1776. It reasoned that the exclusion of venire members must be limited to those who were "irrevocably committed . . . to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings," and to those whose views would prevent them from making an impartial decision on the question of guilt. *Id.*, at 522, n.21, 88 S.Ct. at 1777, n.21. We have reexamined the *Witherspoon* rule on several occasions, one of them being *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), where we clarified the standard for determining whether prospective jurors may be excluded for cause based on their views on capital punishment. We there held that the relevant inquiry is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Id.*, at 424, 105 S.Ct. at 851, quoting *Adams v. Texas*, 448 U.S. 38, 45, 100 S.Ct. 2521, 2526, 65 L.Ed.2d 581 (1980).

Here, MSG McCormick indicated that the chances of his voting for a death penalty were "very remote" (R. 745) and CSM Woods, an ordained minister, said he could never vote for the death penalty (R. 596). After careful examination of the record, we conclude, for the reasons stated by the Court of Military Review, that the military judge, using the proper standard, did not abuse his discretion in granting these challenges. *See United States*

v. Gonzalez-Balderas, 11 F.3d 1218, 1222 (5th Cir.) ("heightened scrutiny" of decision to grant challenge), *cert. denied*, 511 U.S. 1129, 114 S.Ct. 2138, 128 L.Ed.2d 867 (1994); *cf. United States v. Chandler*, 996 F.2d 1073, 1102 (11th Cir. 1993) (abuse-of discretion-standard for decision to deny challenge), *cert. denied*, 512 U.S. 1227, 114 S.Ct. 2724, 129 L.Ed.2d 848 (1994).

ISSUE XIX

WHETHER THE PEREMPTORY-CHALLENGE PROCEDURE IN THE MILITARY JUSTICE SYSTEM, WHICH ALLOWS THE GOVERNMENT TO REMOVE ANY ONE JUROR WITHOUT CAUSE, IS UNNECESSARY AND SUBJECT TO ABUSE IN ITS APPLICATION AND WAS ABUSED IN APPELLANT'S CASE.

ISSUE XX

WHETHER THE MILITARY JUDGE FAILED TO COMPLY WITH *BATSON V. KENTUCKY*, 476 U.S. 79 (1986), AND *UNITED STATES V. MOORE*, 28 MJ 366 (CMA 1989), WHEN HE REFUSED TO HAVE TRIAL COUNSEL, ON THE RECORD, ARTICULATE A RACE-NEUTRAL EXPLANATION FOR THE GOVERNMENT'S PEREMPTORY CHALLENGE OF ONE OF ONLY TWO BLACK MEMBERS ON APPELLANT'S COURT-MARTIAL PANEL.

ISSUE XXI

WHETHER THE GOVERNMENT ERRED BY USING ITS PEREMPTORY CHAL-

LENGE TO EXCLUDE A PANEL MEMBER BASED UPON HIS SCRUPLES ABOUT THE DEATH PENALTY.

Appellant initially attacks the system of military justice because it unnecessarily permits the Government a peremptory challenge even when it has not been denied a challenge for cause. He cites *Ford v. Georgia*, 498 U.S. 41 1, 111 S.Ct. 850, 112 L.Ed.2d 935 (1991), for the proposition that "the apparent reason for the one peremptory challenge procedure is to remove any lingering doubt about a panel member's fairness. . . . . In such a system he asserts that "the [unrestricted] peremptory challenge becomes a device subject to abuse." Final Brief at 179. He thus suggests that his conviction and sentence should be overturned on this basis alone.

Article 41(b), UCMJ, 10 USC § 841 (b), at the time of trial[4] provided: "Each accused and the trial counsel is entitled to one peremptory challenge." *See* RCM 912(g). Obviously, Congress and the President, the constitutionally authorized rulemakers for the military justice system, thought that a reason existed to provide the Government, as a party, a peremptory challenge. *See* 37 MJ at 737-38, citing *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), *overruled* by *Batson*, 476 U.S. at 93, 106 S.Ct. 1712. Neither *Ford v. Georgia*, *supra*, nor any other case invalidates their judgment. Thus, we reject this challenge to appellant's conviction and sentence, as we did in *Loving*, 41 MJ at 294-95.

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[4] This provision became Article 41 (b)(1) by amendment for courts-martial convened beginning November 5, 1990. The new version states: "Each accused and the trial counsel are entitled initially to one peremptory challenge of members of the court." Pub.L. No. 101-510, § 541(c) and (e), 104 Stat. 1565.

Appellant next asserts that the military judge erred by failing to require the prosecution to "timely" articulate a "race-neutral" explanation for the Government's use of its peremptory challenge against one of only two black panel members. He contends that the belated submission of an unsworn statement by trial counsel does not comply with *Batson* or our case law. The Court of Military Review noted the facts surrounding this challenge and rejected appellant's timeliness argument. We agree.

The lower court stated:

> When the government used its peremptory challenge to remove one of the two black court members, the defense counsel demanded an explanation on the record. Although the trial counsel offered to articulate the reason for the challenge, the military judge stated one was not necessary. We agree with the appellant that the trial counsel must articulate a race-neutral explanation for a peremptory challenge if objected to by the defense. *Batson*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 *(1986); Moore*, 28 MJ 366 (CMA 1989) *(per se* rule adopted; when the accused is a member of a recognized racial group and the government uses a peremptory challenge on a member of that racial group and the accused objects, the government is required to provide an explanation). The trial counsel did, however, provide a statement at the next court session, stating a race-neutral explanation for the challenge, to wit, the member's responses concerning the death penalty were equivocal. This statement was included in the record as Appellate Exhibit LVIII. *A statement*

> *included in the record is sufficient as long as it provides the court with a complete explanation for the challenge.* *Moore*, 28 MJ at 366, 368 n. 6-7. The trial counsel's statement provides a sufficiently race-neutral explanation for the challenge, and we find that public confidence in the military justice system has not been undermined. We therefore find the appellant's assertion to be without merit.

37 MJ at 738 (emphasis added). No legal authority has been proffered for appellant's untimeliness argument in these circumstances. *Cf. Morning v. Zapata Protein (USA), Inc.*, 128 F.3d 213, 215-16 (4th Cir. 1997). Moreover, we also find his unsworn-statement argument to be without merit. *See Moore*, 28 MJ at 368 nn. 7-8 (noting broad discretion afforded military judge in how to comply with *Batson*), *rev'd after remand*, 30 MJ 162 (CMA 1990).

Our dissenting brothers, venturing somewhat beyond the particular claims of the defense on this appeal, conclude that the military judge failed to comply with all three of the requirements established in *Batson v. Kentucky*, *supra*, for evaluating peremptory challenges. In *United States v. Greene*, 36 MJ 274, 278 n.2 (1993), we summarized these requirements as follows:

> The three-step process includes: (1) a defendant must make a *prima facie* showing that the prosecutor has exercised a peremptory challenge on the basis of race; (2) the burden then shifts to the Government to articulate a race-neutral explanation for striking the jurors in question; and (3) the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination. *Batson v. Kentucky*, 476 U.S.

79, 97-98, 106 S.Ct. 1712, 1723-24, 90 L.Ed.2d 69 (1986).

The dissent further concludes that this failure denied appellant his constitutional right to equal protection of the law and requires setting aside the findings of guilty and the sentence in this capital case. We disagree. *See generally United States v. Ladell*, 127 F.3d 622, 625 (7th Cir. 1997); *United States v. Carter*, 111 F.3d 509, 512 (7th Cir. 1997).

In this regard, we initially note that appellant was tried in 1987 and the early months of 1988, before the decision of this Court in *United States v. Moore*, 28 MJ 366 (1989), and *United States v. Santiago-Davila*, 26 MJ 380 (1988). At that time we had not yet held that *Batson* applied at courts-martial or that a *prima facie* case of discrimination could be made out by merely showing that a peremptory challenge was lodged against a court-martial member who was of the same minority race as the accused and he objected to that challenge. *See Moore*, 28 MJ at 368 ("After today [August 10, 1989], every peremptory challenge by the Government of a member of the accused's race, upon objection, must be explained by trial counsel."). Nevertheless, trial counsel did provide, albeit belatedly, a race-neutral explanation for his challenge, mooting any question of error in the judge's apparent determination that the defense had not made a sufficient showing to require government explanation. *See United States v. Cooper*, 30 MJ 201, 203 (CMA 1990); *Mahaffey*, 151 F.3d at 679.

Turning to the second *Greene* prong, we obviously conclude that the military judge did not preclude trial counsel from offering any explanation for the challenge against Major Quander. The military judge did more than require trial counsel to simply state whether his

"challenge was a result of his bias or prejudice against the black race. . . ." Shortly after trial counsel denied such an intent and proffered unsuccessfully an explanation for that challenge, the military judge relented and permitted trial counsel to attach to the record a memorandum signed by trial counsel explaining the challenge. *See Turner v. Marshall*, 121 F.3d 1248, 1254 n.2 (9th Cir. 1997) (contemporary explanation of prosecutor favored), *cert. denied*, ___ U.S. 118 S. Ct. 1178, 140 L.Ed.2d 186 (1998); *cf. Simmons v. Beyer*, 44 F.3d 1160, 1168 (3d Cir.) (record not sufficient without prosecutorial explanation), *cert. denied*, 516 U.S. 905, 116 S.Ct. 271, 133 L.Ed.2d 192 (1995); *Cochran v. Herring*, 43 F.3d 1404, 1411 n.11 (11th Cir. 1995), *cert. denied*, 516 U.S. 1073, 116 S.Ct. 776, 133 L.Ed.2d 728 (1996). Finally, the reason articulated in the memorandum, *i.e.*, Major Quander's indecisiveness on the death penalty as a punishment, is a well recognized race-neutral explanation for a peremptory challenge. *See Howard v. Moore*, 131 F.3d 399, 407-08 (4th Cir. 1997), *cert. denied*, ___ U.S. ___, 119 S.Ct. 108, 142 L.Ed.2d 86 (1998); *Kilgore v. Bowersox*, 124 F.3d 985, 992 (8th Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S.Ct. 2352, 141 L.Ed.2d 722 (1998); *see generally United States v. Canoy*, 38 F.3d 893, 898 (7th Cir. 1994).

Finally, on the third *Greene* prong, we do not agree with the dissent that "the military judge [did not] make a determination as to whether trial counsel's explanation was credible or pretextual." 51 MJ at 69. Optimally, an express ruling on this question is preferred. However, the judge clearly stated his satisfaction with trial counsel's disavowal of any racist intent in making the challenge. Moreover, he asked defense counsel whether they "have some facts that would indicate a different result," and he permitted trial

counsel "to append to the appellate record a Memorandum for Record indicating the Government's reason for perempting Major Quander." Finally, he ensured that defense counsel had "seen" the memorandum for record and inquired whether there was "[a]nything else." Viewing this conduct of the judge in its entirety, we conclude that it constitutes an implied ruling on his part that trial counsel's explanation was genuine and that appellant's *Batson* claim was without merit. *See generally Purkett v. Elem*, 514 U.S. 765, 769, 115 S.Ct. 1769, 1771-72, 131 L.Ed. 2d 834 (1995); *see also United States v. Clemons*, 941 F.2d 321, 323-24 (5th Cir. 1991) (district court has discretion to determine procedures to test genuineness of race-neutral explanations); *cf. United States v. Tucker*, 836 F.2d 334, 340 (7th Cir. 1988), *cert. denied*, 490 U.S. 1105, 109 S.Ct. 3154, 104 L.Ed.2d 1018 (1989); *see also United States v. Arce*, 997 F.2d 1123, 1127 (5th Cir. 1993) (no need to make ruling where defense fails to dispute government explanation).

Appellant finally asserts that the Government's exercise of its peremptory challenge against Major Quander because of his scruples against capital punishment was unconstitutional. *See Brown v. North Carolina*, 479 U.S. 940, 942, 107 S.Ct. 423, 93 L.Ed.2d 373 (1986) (Brennan and Marshall, JJ., dissenting on denial of certiorari). The record indicates that Major Quander on *voir dire* admitted that "I would have a very difficult time doing it." The Government argues that his answers suggest that his views also would "prevent or substantially impair the performance of his duties as a juror . . ." and this was a proper consideration under *Witt*, 469 U.S. at 412, 105 S.Ct. 844. Answer at 84 n.57. The Court of Military Review opined that the Government proffered "a sufficiently race-neutral

explanation" for its challenge which did not otherwise violate the Constitution. 37 MJ at 738.

We reject appellant's argument under the circumstances of this case. We note that extension of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), to a peremptory challenge based on death-penalty scruples rather than on race has not been accepted by a majority of the Supreme Court. *See Brown*, 479 U.S. at 940-41, 107 S.Ct. 423 (O'Connor, J., concurring on denial of certiorari); *cf. id.* at 942, 107 S.Ct. 423 (Brennan and Marshall, JJ., dissenting on denial of certiorari). Moreover, even if *Batson* was extended to prevent the prosecutor from obtaining a "hanging jury" without death penalty scruples, this rule would not apply to Major Quander's challenge. His removal was based on his "indecisive[ness]" about capital punishment, an attitude which "would, prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *See Witt*, 469 U.S. at 424, 105 S.Ct. 844. Finally, no objection was lodged at trial against the Government's explanation of Major Quander's challenge on this basis; thus, we see no plain error by the judge in allowing the prosecutor's peremptory challenge. *See Arce*, 997 F.2d at 1126-27.

ISSUE XXII

WHETHER THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT IN A CAPITAL CASE BY ADMISSION OF GRUESOME PHOTOS OF THE DECEDENTS, INCLUDING PROSECUTION EXHIBIT 214, WHICH IS A PHOTOGRAPH OF A VICTIM'S BADLY DECAYED FACE, WITH A

GUNSHOT WOUND TO THE EYE SOCKET.

We reject appellant's argument for the reasons ably stated by the Court of Military Review. 37 MJ at 738-39. In this multiple violent-murder case, it cannot be seriously argued that these photographs were admitted only to inflame or shock this court-martial. Moreover, we agree with the court below that the photographs' probative value in this context was not substantially outweighed by any prejudicial effect. *See* Mil.R.Evid. 403, Manual, *supra*.

ISSUE XXIII

WHETHER THE OUTCOME OF APPELLANT'S TRIAL WAS JEOPARDIZED BY THE ERRORS OF THE MILITARY JUDGE AND THE PROSECUTION WHEN THE PROSECUTION FAILED TO DISCLOSE THE IDENTITY OF A REGISTERED SOURCE IN POSSESSION OF INFORMATION FAVORABLE TO THE DEFENSE, AND THE MILITARY JUDGE WOULD NOT ORDER DISCLOSURE.

For the first time on appeal before us, appellant challenges the decision of the military judge not to order the prosecution to reveal the identity of its informant, "Registered Source No. 0590 [hereinafter RS]." At trial he asserted that the judge's action precluded the defense from disproving the prosecution's factual theory that Ms. Vickery-Clay was murdered in the woods *prior* to the burning of her house trailer. *See Roviaro v. United States*, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957). On appeal, he also asserts that the prosecution unfairly denied him an

opportunity to question the RS about other possible defenses which might arise from his pretrial statements to CID. *See Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

The first step we must take to resolve this issue is to identify the expected testimony of the RS sought by the defense. Trial defense counsel initially asserted based on CID reports, that this witness would testify that "the Vickery-Clay vehicle [was parked] outside her trailer when the fire began." Final Brief at 193. He also would testify that he saw a large heavy set black male at the scene of the fire.

Next, we must address the question whether this information sought by the defense was relevant to the murder, rape, and sodomy charges concerning Ms. Vickery-Clay. We initially note that appellant was not charged with arson of Ms. Vickery-Clay's trailer. However, the prosecutor at this court-martial acknowledged that his murder-charge proof would show that appellant murdered Ms. Vickery-Clay in the woods, returned to her trailer in her car, and then burned that trailer to destroy any evidence linking him to the murder. In this context, RS' testimony on placement of the car next to the trailer before the fire was relevant, if not supportive, of the prosecution's theory of guilt. *See* Mil.R.Evid. 401 and 402.

Nevertheless, trial defense counsel asserted that the testimony of the RS in conjunction with a second expected defense witness was also helpful to his defense. He notes that Ms. Winhoult [or Wineholt] was expected to testify that, *prior to the fire*, she saw Ms. Vickery-Clay's automobile parked outside Ms. Winhoult's trailer and observed "a black, heavyset male leaning into the driver's window" and she heard "a female voice." Appellate counsel argues that the RS's testimony was material because

> [t]he defense counsel related that he had interviewed several witnesses and determined that the RS and one unknown individual with him were the only witnesses who saw the Vickery-Clay vehicle outside her trailer when the fire began. The defense argued that this evidence, combined with Ms. Winhoult's, demonstrated that when the Vickery-Clay vehicle was spotted prior to the fire, there was a female inside. Shortly after it was spotted, a heavy set black male walked away from the area. After this occurred, the vehicle was moved over to the Vickery-Clay trailer, and then the fire occurred. The defense counsel argued that this evidence created reasonable doubt in the government theory that the appellant killed Vickery-Clay in the woods, drove her car to the vicinity of the Winhoult trailer, and burned the Vickery-Clay trailer. (R. at 1022-27).

Final Brief at 193.

The military judge denied appellant's request for disclosure of the RS's identity on this somewhat complicated proffer. He held that "the benefit of this information the source could provide is far outweighed by the loss—of the Government would suffer as a consequence of a revelation of the name." There is no dispute in this case with the judge's determination that the RS was an "extremely productive" source of "long standing." The military judge reached this conclusion after reviewing *in camera* this operative's file. However, there was a dispute over the favorability of the RS's expected testimony to the defense and the judge's balancing of these concerns as required by *Roviaro*, 353 U.S. at 61, 77 S.Ct. 623. We conclude that

the military judge did not abuse his discretion in implicitly holding that, under the circumstances, "the disclosure of [this] informer's identity . . . is [not] relevant and helpful to the defense of [this] accused, or is [not] essential to a fair determination of [this] cause[.]" *Id.* at 60-61, 77 S.Ct. 623; *see United States v. Sai Keung Wong*, 886 F.2d 252, 255 (9th Cir. 1989).

In this regard, we note that the defense theory of contradiction of the prosecution's case was largely based on the expected testimony of Mrs. Winhoult, not that of the RS. She was supposed to testify that she observed Ms. Vickery-Clay's car parked outside the Winhoult trailer prior to the fire and heard an unidentified female voice in that car talk to a large male prior to the fire. Her testimony, even if corroborated in some respect by the RS, does not clearly establish that Ms. Vickery-Clay was alive prior to her trailer's fire, thus contradicting the prosecution's case. In any event, the defense did not even call this witness or otherwise pursue this theory of contradiction at trial. *Id.; see United States v. Robinson*, 144 F.3d 104, 107 (1st Cir. 1998) (court need not order disclosure where informant not the only witness to contradict government case).

We further note that the defense did not establish that the RS would corroborate Mrs. Winhoult's testimony on any of its critical points. The RS was not expected to testify that he heard a female voice come from Ms. Vickery-Clay's vehicle prior to the fire talking to a large male. Moreover, the RS's expected testimony on the placement of the victim's vehicle as being adjacent to the victim's trailer contradicted Mrs. Winhoult's expected testimony. Finally, the speculative movement-of-the-car theory proposed by the defense was not directly supported by Mrs. Winhoult's statements. In this context, the military judge did not

abuse his discretion, in refusing to disclose the identity of RS for testimony on what became an immaterial matter. *See United States v. Wright*, 145 F.2d 972, 975 (8th Cir.), *cert. denied*, ___ U.S. ___, 119 S.Ct. 272, 142 L.Ed.2d 224 (1998); *cf. Devose v. Norris*, 53 F.3d 201, 206 (8th Cir. 1995) (first-hand witness or participant in charged crime should be disclosed).

Further relying on other CID reports, appellant asserts that he was denied the opportunity to question the RS about various other matters which might have provided a defense to the Vickery-Clay murder charge. He asserts that the prosecution did not "disclose the full extent of the RS's involvement in appellant's case" until after trial. He notes that Appellate Exhibit LXX shows that the RS had additional knowledge about this case, as follows:

> 1. That the RS had seen appellant in the area of the Bragg hotel.
>
> 2. That another taxi driver named "Ann" had driven appellant around the Fort Bragg and Pope Air Force Base area on 16 December 1986 at approximately 2200-2300 hours.
>
> 3. That he had spoken with another taxi driver named "Debbie" who had driven SPC Gray and his wife to various destinations.
>
> 4. That one of the destinations included the East Coast Pawn Shop and "that Gray's wife did most of the pawning."

Final Brief at 194.

He concludes that in determining the RS's materiality, this Court should consider "the possible defense which questioning of the RS might have produced." Counsel identified these questions for the RS:

1. Was Vickery-Clay . . . alive at the time of the fire, contrary to the theory of the government?

2. Did the RS see the same heavy set black male at the scene of the fire?

3. Was that individual SPC Gray?

4. If that individual was SPC Gray, had he departed the area prior to the fire?

5. Were the accused and his wife engaged in a pattern of "pawning" stolen property?

6. Was the accused's wife involved in the Miskanin offenses?

7. Whether the Miskanin pistol was stolen for the purpose of "pawning" it, rather than for the commission of premeditated murder?

8. Were "Ann" and "Debbie" the only other taxi cab drivers that had contact with SPC Gray?

9. What was the nature of that contact?

Final Brief at 197.

Appellant's second approach to failure of the prosecution to disclose the identity of the RS suggests a violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). He asserts that his right to a fair trial is violated when exculpatory evidence in the prosecution's possession is not turned over to defense. Moreover, he asserts that the newly discovered knowledge of the RS's existence should be considered exculpatory (material and favorable to the defense) when the Government precludes the defense from fully investigating such information. *See United States v. Bagley*, 473 U.S. 667, 683, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985) (opinion of Blackmun, J.), and *United States v. Fisher*, 24 MJ 358, 362 (CMA 1987).

We note that none of the information purportedly possessed by the RS comes anywhere near being considered exculpatory evidence. *See United States v. Watson*, 31 MJ 49, 54 (CMA 1990). It does not provide a defense to appellant or contradict the prosecution's case in any substantial way. Moreover, we are not inclined to speculate as to the answers the RS would have given to defense appellate counsel's questions where there is no basis in the record for concluding his answers would provide *Brady* material. *Cf. United States v. Rivera*, 24 MJ 156, 158 (CMA 1987) (content reasonably available from later defense proffer); *Fisher*, 24 MJ at 362 (record imports a reasonable possibility that proffered evidence was material). We find no violation of *Roviaro or Brady* in this context.

ISSUE XXIV

WHETHER THE MILITARY JUDGE IMPROPERLY DENIED A DEFENSE MOTION FOR A MISTRIAL BASED ON TRIAL COUNSEL'S COMMENTS ON APPELLANT'S DEMEANOR AND RIGHT TO REMAIN SILENT.

During his argument on sentencing, trial counsel stated the following:

> You've had an opportunity to—to see the accused on a daily basis here for about three weeks. Ask yourself a question: has he ever indicated to you by his actions any remorse for what he's done? You can consider that. You should consider that.

Defense counsel did not object at that time. At the conclusion of trial counsel's argument, defense counsel requested a side-bar conference and objected to the

prosecutor's language as an impermissible comment on appellant's right to remain silent. The military judge then instructed the members as follows:

> With regard to the counsel's indication, or phrase, "has the accused indicated by his actions any remorse?", that is susceptible of an interpretation of a comment upon his—the accused having remained silent and not having testified in the case, as I'm sure you [sic] aware. The right to remain silent is a constitutional guarantee of all of us, and no inference—adverse inference may be drawn from the fact that the accused elected not to testify in this case. And I'm sure that you will not draw any such adverse inference, nor read into it—the counsel's—trial counsel's closing argument, that that was a comment upon his right to remain silent.

At the conclusion of the military judge's instructions on sentencing, trial defense counsel made a motion for a mistrial.

The military judge was concerned enough with trial counsel's argument to issue an instruction to the members to prevent their being misled by it. *See Gaskins v. McKellar*, 916 F.2d 941, 951 (4th Cir. 1990), *cert. denied*, 500 U.S. 961, 111 S.Ct. 2277, 114 L.Ed.2d 728 (1991); *see also Resnover v. Pearson*, 965 F.2d 1453, 1465 (7th Cir. 1992), *cert. denied*, 508 U.S. 962, 113 S.Ct. 2935, 124 L.Ed.2d 685 (1993). This instruction was protective in nature and expressly directed the members to refrain from drawing any inference from appellant's exercise of his right to remain silent. *Cf. United States v. Moore*, 917 F.2d 215, 226 (6th Cir. 1990). We are satisfied that these circumstances did not require that the military judge grant a mistrial. *See*

United States v. Rushatz, 31 MJ 450, 456 (CMA 1990) (mistrial is an extraordinary remedy; curative instruction "preferred remedy"); *see also Feltrop v. Delo*, 46 F.3d 766, 775 (8th Cir. 1995);[5] *Hughes v. Johnson*, 991 F.Supp. 621, 637 (S.D. Tex. 1998); *Six v. Delo*, 885 F.Supp. 1265, 1285 (E.D. Mo. 1995), *aff'd*, 94 F.3d 469 (8th Cir. 1996), *cert. denied*, 520 U.S. 1255, 117 S.Ct. 2418, 138 L.Ed.2d 182 (1997).

ISSUE XXV

WHETHER APPELLANT WAS SENTENCED TO DEATH IN VIOLATION OF THE EIGHTH AMENDMENT PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT WHEN THE MILITARY JUDGE PRECLUDED THE SENTENCING PANEL FROM CONSIDERING APPELLANT'S BACKGROUND AS A BASIS FOR A SENTENCE LESS THAN DEATH.

Appellant asserts that the military judge committed constitutional error in his case by preventing the members from considering his social and family background as a mitigating circumstance in their death-penalty decision. He calls our attention to the military judge's denial of his request for the members to consider that his "difficult and impoverished upbringing" were "mitigating circumstances to be weighed against the aggravating" circumstances in determining his eligibility for the death penalty and whether to impose it in his case. *See* RCM 1004(b)(4)(c). He particularly notes the judge's decision excluding a videotape of a network television show dealing with the poor living conditions and social dynamics of his community,

[5] The subsequent opinion in this case, 91 F.3d 1178, 1182 (8th Cir. 1996), did not affect the 1995 opinion regarding the issue here.

Liberty City, Miami, Florida. *See* RCM 1004(b)(3). Final Brief at 212-13. The judge's actions as a whole, he asserts, created an impermissible "risk that the death penalty . . . [was] imposed in spite of factors which may call for a less severe penalty." *Lockett v. Ohio*, 438 U.S. 586, 605, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (plurality opinion); *see Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987); *Penry v. Lynaugh*, 492 U.S. 302, 328, 109 S.Ct. 2934, 106 S.Ct. 256 (1989).

The first question we must address is whether exclusion of the defense-proffered video on life in Liberty City, a part of Miami, Florida, warrants reversal of appellant's death sentence. The military judge excluded it on relevance grounds, holding that "[t]he evidence before the court is to the effect that Gray was not affected factually by his environment and so, it's of no consequence." Appellant argues that this holding denied him evidence of mitigating circumstances required to be admitted by the Eighth Amendment. *See Lockett*, 438 U.S. at 605, 98 S.Ct. 2954 (opinion of Burger, C.J.), and *Hitchcock v. Dugger*, *supra*.

The Supreme Court has indeed recognized the broad right of a capital defendant to introduce mitigating evidence to avoid the death penalty. *See Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed2d 1 (1986). This right is fully embraced in RCM 1004(b)(3). However, the Supreme Court has not attempted to rewrite the rules of evidence for capital-punishment proceedings. *See Romano*, 512 U.S. at 11-12, 114 S.Ct. at 2011. Relevance and other concerns expressed in a jurisdiction's rules of evidence are still to be applied in the traditional manner by the judge. *See Lockett*, 438 U.S. at 604 n.12, 98 S.Ct. at 2965 n.12 (opinion of Burger, C.J.).

Here, the military judge determined that evidence of conditions of appellant's hometown was irrelevant

because up to that point all the evidence presented suggested that appellant was not affected by this environment. *See also Davis v. Scott*, 51 F.3d 457, 462 (5th Cir.), *cert. denied*, 516 U.S. 992, 116 S.Ct. 525, 133 L.Ed.2d 432 (1995). We agree with appellant, however, that the testimony of Doctor Armitage and Doctor Rose that Private Gray's background could have impacted upon his development established the necessary relevance of evidence of his background. *See Boyd v. French*, 147 F.3d 3 19, 325-27 (4th Cir. 1998), *cert. denied*__ U.S. __, 119 S.Ct. 1050, 143 L.Ed.2d 56 (1999). However, we also hold that any error in excluding the videotape on Liberty City was harmless error. Other evidence was admitted in this case through the testimony of appellant's mother and sister regarding his childhood "in the projects" of Miami, and his abusive relationship with his stepfather. Any error in excluding this videotape was clearly harmless beyond any doubt. *See also Castro*, 138 F.3d at 832.

Appellant's second argument is that the military judge precluded the members of his court-martial from considering admitted evidence of his family and social background as a mitigating circumstance in their death-penalty decision. *See Penry v. Lynaugh, supra.* He notes that the judge expressly refused to instruct as requested by the defense that background evidence be considered a mitigating circumstance. He also notes that the judge did not list these circumstances as mitigating to the members which suggested to the members that they should not be so considered. *See Hitchcock*, 481 U.S. at 398-99, 107 S.Ct. 1821. We disagree.

We initially note that the applicable principle of law established by *Lockett v. Ohio, supra,* and its progeny is well recognized. Recently, in *Johnson v. Texas*, 509 U.S.

350, 361-62, 113 S.Ct. 2658, 2666, 125 L.Ed.2d 290 (1993), Justice Kennedy for a majority of the Court stated:

> "*Lockett* and its progeny stand only for the proposition that a State may not cut off in an absolute manner the presentation of mitigating evidence, either by statute or judicial instruction, or by limiting the inquiries to which it is relevant so severely that the evidence could never be part of the sentencing decision at all." *McKoy v. North Carolina*, 494 U.S. 433, 456, 110 S.Ct. 1227, 1240, 108 L.Ed.2d 369 (1990) (KENNEDY, J., concurring in judgment); *see also Graham*, 506 U.S. at 475, 113 S.Ct. at 901-02; *Saffle v. Parks*, 494 U.S. 484, 490-491, 110 S.Ct. 1257, 1261, 108 L.Ed.2d 415 (1990).

Moreover, in that same case, the Supreme Court noted the standard set out in *Graham v. Collins*, 506 U.S. 461, 475, 113 S.Ct. 892, 902, 122 L.Ed.2d 260 (1993), for determining whether an instruction effectively placed "relevant mitigating evidence . . . beyond the effective reach of the sentencer." 509 U.S. at 366, 113 S.Ct. 2658. Justice Kennedy wrote:

> The standard against which we assess whether jury instructions satisfy the rule of *Lockett* and *Eddings* [*v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982)] was set forth in *Boyde v. California*, 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990). There we held that a reviewing court must determine "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." "*Id.*, at 380, 110 S.Ct., at 1198. Although the reasonable likelihood

> standard does not require that the defendant prove that it was more likely than not that the jury was prevented from giving effect to the evidence, the standard requires more than a mere possibility of such a bar. *Ibid.* In evaluating the instructions, we do not engage in a technical parsing of this language of the instructions, but instead approach the instructions in the same way that the jury would—with a "common sense understanding of the instructions in the light of all that has taken place at the trial. " *Id.*, at 381, 110 S.Ct., at 1198.

509 U.S. at 367-68, 113 S.Ct. at 2669.

Turning to appellant's case, we note that the military judge did not expressly instruct the members not to consider appellant's family and social background as mitigating circumstances. Moreover, we reject appellant's argument that the reasonable implication of his mitigating-circumstances instruction was that this evidence should not be considered as a mitigating circumstance. Although the military judge did not expressly delineate this evidence as a mitigating circumstance, he did expressly instruct the members to consider the psychiatric opinions of Doctors Armitage and Rose concerning appellant's personality disorder. These opinions in turn were expressly based on and referenced appellant's family and social background. *Cf. Hitchcock v. Dugger, supra.*

Turning to the record, we note that the military judge instructed the members, *inter alia*, on mitigating circumstances as follows:

> You must consider all evidence in extenuation and mitigation and balance them against the aggravating factors using the test I previously instructed you upon. Thus, you should consider

> the following extenuating and mitigating factors: the accused's age, which is 22 years, the accused's good military character, as well as his duty performance and the characterization of him as—by his—the various and sundry witnesses on extenuation and mitigation....
>
> Additionally, you should consider in extenuation and mitigation, and in weighing those against the aggravating factors, the accused's personality disorder as testified to by Dr. Armitage, Dr. Rose, and Dr. Warren. You can best recall precisely what they had to say. Additionally, the duration of the accused's pretrial confinement....

Doctor Armitage's testimony on appellant's personality disorder includes express reference to appellant's social and family upbringing. He testified as follows:

> Q: These personality disorders, are these—are these sub-groups—they're not self-inflicted on the part of Specialist Gray?
>
> A: That's correct.
>
> Q: They're something that he got either through—he inherited them or part of the child rearing or whatever?
>
> A: Generally the—in the state of the knowledge that we have now, there are probably many different reasons that people end up the way Specialist Gray ends up, or the way any of us ends up—many different reasons.
>
> Q: Were you able to identify any specific factors that caused Specialist Gray's personality disorders to develop?

A: There are a number of factors in his background that I think are less than helpful—were less than helpful in his development.

Q: Such as?

A: Well, he had early in life a fair—fairly substantial socioeconomic depravation, multiple male figures in the home, multiple physical moves, living in substandard-proverty [sic] conditions, circumstances where the electric lights were turned out by the company because bills were not paid, projectal[6] [sic] living, things of this nature—multiple school changes.

Now, some people could say that sounds like the military, multiple school changes, but the reason for the changes are different. They're not planned, group accepted changes. You have to move to some other place cause you can't pay the rent, so you end up in another school. Things of that nature. He had a stepparent at one time who was extremely abusive to his mother and abusive to himself, using belts on him to the point of inflicting injury, drawing blood. He felt the need to protect his mother from—from this abuse. Lived in a—in a part of Miami that certainly was—was not where you and I would want to live by any means. Curiously enough, in all of this, however, he didn't succumb to some behaviors that many people in those environments succumb to. He didn't become a drug abuser; he didn't become an alcoholic. As far as we know, didn't become a petty thief. . . .

* * *

[6] Apparently meaning—in a housing project.

Questions by Military Judge:

Q: It may not seem quite as—germane, but it is to me. You've listened to all these factors that you perceive that have some sort of effect that would—or causation factor, and the result that you perceive in Gray, like economic depravation, multiple father figures, etcetera. If ah—with regard to the environment, if the evidence indicates this environment that is as you characterized—I believe in living—perhaps, I believe you may have said in an undesirable part of Miami, or some phraseology of that nature anyway—if the evidence indicated that the individual was not affected by that particular environment, then would that environment become relevant at all?

A: No, it wouldn't, and you raised a very excellent question, the answer to which we don't have. And the answer would require that we know why one individual is affected by the environment and why another isn't. But this we do know. People from backgrounds similar to Specialist Gray have much greater incidents of violations of societal rules and crime. There are several other features of his background that we haven't touched on that would address your question. And that is - when he came into the Army he was a pretty socially backward individual.

We conclude that a common sense understanding of the instructions in light of all that took place at the trial was that the members should consider appellant's background as a mitigating circumstance. *See Castro*, 138 F.3d at 830; *Bolender v. Singletary*, 16 F.3d 1547,

1566 (11th Cir.), *cert. denied*, 5 13 U.S. 1022, 115 S.Ct. 589, 130 L.Ed.2d 502 (1994); *cf. Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987).

ISSUE XXVI

WHETHER THE MILITARY JUDGE FAILED TO INSTRUCT THE PANEL MEMBERS THAT THE SPECIFICATION OF CHARGE IV (LARCENY) IS MULTIPLICIOUS FOR SENTENCING PURPOSES WITH THE SPECIFICATION OF CHARGE VII (BURGLARY).

The defense at trial made a motion that the burglary of the Miskanin residence and the larceny of property therefrom be considered multiplicious for sentencing. This motion was made prior to the decision of this Court in *United States v. Teters*, 37 MJ 370 (1993), and the military judge denied this motion, using a societal-norm test. *See* RCM 1003(c)(1)(C), Discussion ("No single test or formula has been developed which will resolve the question of multiplicity.") In view of the numerous other offenses for which appellant was found guilty and their heinous nature, any error committed by the judge in this regard was harmless beyond any doubt. *See generally* Art. 59(a), UCMJ, 10 USC § 859(a).

ISSUE XXVII

WHETHER APPELLANT'S DEATH SENTENCE VIOLATES THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS AND UCMJ, ARTICLE 55, IN THAT APPELLANT WAS GIVEN THE DEATH PENALTY BASED UPON A CONGLOMERATION OF AGGRAVATING FACTORS

WHICH INEXTRICABLY DOUBLE COUNTED APPELLANT'S CRIMES, AND THE FAILURE OF THE MILITARY JUDGE TO INSTRUCT THE PANEL THAT ONE ACT CANNOT BE CONSIDERED AS TWO AGGRAVATING FACTORS WHEN DETERMINING IF AGGRAVATING FACTORS SUBSTANTIALLY OUTWEIGH EXTENUATING AND MITIGATING FACTORS.

Appellant was found guilty of two specifications of premeditated murder, in violation of Article 118(1), in addition to numerous other offenses in this case. As a first step to establish appellant's death-penalty eligibility, the Government had to establish "one or more of the . . . aggravating factors" listed in subsection (c) of RCM 1004. Appellant asserts that the military judge erred by failing to instruct the members not to double count aggravating factors or find more than one aggravating factor based on the evidence of a single offense. Such double counting, he asserts, precludes the members from properly determining that he was eligible to receive the death penalty (RCM 1004(b)(4)(C)) and that he should, after all, receive it. *See People v. Harris*, 679 P.2d 433, 452 (Cal. 1984), and *State v. Tittle*, 710 P.2d 449, 454-55 (Ariz. 1985); *cf. People v. Proctor*, 842 P.2d 1100, 1129-30 (Cal. 1992); *see generally Stringer v. Black*, 503 U. S. 222, 235, 112 S.Ct. 1130, 1135, 117 L.Ed.2d 367 (1992) (must avoid "risk that the jury . . . treat[ed] the defendant as more deserving of the death penalty than he might otherwise be").

We initially note that the version of RCM 1004(b) applicable at trial provides the following concerning aggravating factors:

> (2) *Evidence of aggravating factors.* Trial counsel may present evidence in accordance

with RCM 1001(b)(4) tending to establish one or more of the aggravating factors in subsection (c) of this rule.

* * *

(4) *Necessary findings.* Death may not be adjudged unless—

(A) The members find that at least one of the aggravating factors under subsection (c) existed;

(B) Notice of such factor was provided in accordance with paragraph (1) of this subsection and all members concur in the finding with respect to such factor; and

(C) All members concur that any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances admissible under RCM 1001(b)(4), including the factors under sub-section (c) of this rule.

The version of RCM 1004(c)(7) applicable at trial provided:

(7) That, only in the case of a violation of Article 118(1):

(B) The murder was committed while the accused was engaged in the commission or attempted commission of any robbery, rape, aggravated arson, sodomy, burglary, kidnapping, mutiny, sedition, or piracy of an aircraft or vessel, or was engaged in flight or attempted flight after the commission or attempted commission of any such offense;

* * *

(I) The murder was preceded by the intentional infliction of substantial physical harm

or prolonged, substantial mental or physical pain and suffering to the victim; [and]

(J) The accused has been found guilty in the same case of another violation of Article 118[.]

The military judge instructed the members on aggravating circumstances as follows:

> You're advised that, in view of your findings, the court is authorized to adjudge a sentence of death, or life imprisonment only, with other types of punishments like reduction and forfeitures, which I'll mention in just a moment.
>
> You may adjudge a sentence of death only under certain circumstances. First, the death sentence may not be adjudged unless all the court members find beyond a reasonable doubt that one or more of the aggravating factors existed. Those aggravating factors which are set forth on the sentence worksheet for you are:
>
> *that the premeditated murder of Laura Lee Vickery-Clay was committed while the accused was engaged in the commission of a rape or sodomy of the victim;*
>
> *that as to Kimberly Ann Ruggles, that the premeditated murder of Kimberly Ann Ruggles was committed while the accused was engaged in the commission of a rape, sodomy, or robbery of the victim;*
>
> *that as to the Vickery—Laura Lee Vickery-Clay, that the premeditated murder of Laura Lee Vickery-Clay was preceded by the intentional infliction of substantial mental and physical pain and suffering to the victim;*

that as to the premeditated murder of Kimberly Ann Ruggles, that the premeditated murder of Kimberly Ann Ruggles was preceded by the intentional infliction of substantial mental and physical pain and suffering of the victim; and finally,

that the accused has been convicted in the same case—which he has—of more than one violation of Article 118.

Again, you may not adjudge a death sentence unless all the court members—that is unanimously—find beyond a reasonable doubt that one or more of those aggravating factors existed. And again, those—those factors are set forth in the sentence worksheet.

All of the members of the court must agree beyond a reasonable doubt that one or more of those aggravating factors existed at the time of the offenses, or offense, or resulted from the offense. It is not sufficient that some members find that one aggravating factor existed, while the remaining members find that a different aggravating factor existed. Rather, all of you must find beyond a reasonable doubt that the same aggravating factor, or factors, existed before a sentence of death may be adjudged. . . .

(Emphasis added.) The members found these five aggravating factors in this case.[7] *See* 37 MJ at 741 n.8.

Appellant initially argues that an instruction against double counting is most appropriate in a case like his where two murder convictions exist. He asserts that

[7] Although the aggravating factors found by the members were not orally announced as required by RCM 1004(b)(8), the sentence worksheet (App. Ex. CII) shows that all five were found by all the members.

without a proper instruction, the members might think that each murder conviction constitutes an aggravating factor for the other; providing two aggravating circumstances instead of one. He cites the decision of this Court in *United States v. Curtis*, 33 MJ 101 (1991), *cert. denied*, 502 U.S. 1097, 112 S.Ct. 1177, 117 L.Ed.2d 421 (1992), as authority for prohibiting this double counting.

We note that in *Curtis*, this Court considered a different situation. There, Senior Judge Everett noted:

> COMPUTATION OF
> AGGRAVATING FACTORS
>
> In one respect, however, the procedure employed may have prejudiced Curtis. As we noted in our earlier opinion, three "aggravating factors" were found by the members. In substance they were: 1) "the premeditated murder of" Mrs. Lotz "was committed while [Curtis] was engaged in the commission of a burglary"; 2) "with regard to the premeditated murder of" Mrs. Lotz, Curtis had "been found guilty in the same case of another murder"—that of Lieutenant Lotz; and 3) "with regard to the premeditated murder of" Lieutenant Lotz, Curtis had "been found guilty in the same case of another murder"—that of Mrs. Lotz. 32 MJ at 269.

33 MJ at 108. Clearly, this type of double counting did not occur in this case as double murder was considered only once as an aggravating factor. *See* 37 MJ at 741; *cf. People v. Harris, supra.*

Appellant, however, urges us to also adopt a rule against double counting aggravating circumstances

based on a single offense and substantially the same evidence. *See Harris*, 679 P.2d at 450. In *Harris*, a plurality of the Supreme Court of California made clear that such a rule against double counting was required in part by its state statutes. *Contra Proctor*, 842 P.2d at 1129-30; *People v. Melton*, 750 P.2d 741, 772-74 (Cal. 1988). No such rule appears in RCM 1004, and we do not consider it required by the Due Process Clause of the Fifth Amendment. In any event, the Court of Military Review reconsidered this case "in light of the absence of such an instruction and determined that the sentence would have been the same." 37 MJ at 741, *citing Stringer v. Black*, 503 U.S. 222, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992). We agree.

ISSUE XXVIII

WHETHER THE MILITARY JUDGE COMMITTED PLAIN ERROR BY FAILING TO INSTRUCT THE MEMBERS ON SENTENCING AS TO THE MEANING OF THE TERM "SUBSTANTIALLY OUTWEIGHED," WITH REGARD TO THE RELATIONSHIP OF MITIGATING CIRCUMSTANCES TO AGGRAVATING FACTORS.

We find no plain error in the military judge's instruction. He instructed the members *inter alia*, as follows:

> If, however, you determine that at least one of the aggravating factors existed, then you may consider, along with all other appropriate sentence possibilities, whether a sentence of death should be adjudged. In this regard, you may not adjudge a sentence of death unless you find, by unanimous vote—again, by all

> members—that any and all extenuating and mitigating factors are substantially outweighed by any aggravating factors, including the factors which you've previously found existed in the first step of this procedure[.]

The phrase "substantially outweighed" is found in RCM 1004(b)(4)(C). It has been approved expressly and implicitly by this Court. *See Loving*, 41 MJ at 278-79; *Curtis*, 33 MJ at 107-08. We find no constitutional or other legal error in use of this term. *See generally Victor v. Nebraska*, 511 U.S. 1, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994); *see also Ortiz v. Stewart*, 149 F.3d 923, 944 (9th Cir. 1998).

ISSUE XXIX

WHETHER THE FINDINGS MUST STATE EXPLICITLY THAT ALL MEMBERS CONCUR THAT ANY EXTENUATING OR MITIGATING CIRCUMSTANCES ARE SUBSTANTIALLY OUTWEIGHED BY THE AGGRAVATING FACTORS FOUND BY THE MEMBERS.

There is no requirement as a matter of constitutional or military law that the findings *state* that all members concur in the balancing judgment. However, the military judge instructed the members on this responsibility *(see* 51 MJ at 45) and the vote sheet stated specifically: "The court-martial unanimously finds any and all extenuating and mitigating factors are substantially outweighed by the aggravating factors . . ." Therefore, appellant's contention in this regard is rejected. *See* 37 MJ at 756; *see also Loving*, 41 MJ at 296.

ISSUE XXX

WHETHER THE DEATH PENALTY SENTENCING STANDARD REQUIRING AGGRAVATING FACTORS TO "SUBSTANTIALLY OUTWEIGH" EXTENUATING AND MITIGATING CIRCUMSTANCES IS IN VIOLATION OF THE FIFTH AND EIGHTH AMENDMENTS IN THAT THE ONLY ACCEPTABLE STANDARD MUST BE "BEYOND A REASONABLE DOUBT." *SEE ALSO* ART. 59(a), UCMJ.

Appellant acknowledges that the Supreme Court has held "that specific standards for balancing aggravating against mitigating circumstances are not constitutionally required." *Buchanan v. Angelone*, 552 U.S. 269, 118 S.Ct. 757, 761-62, 139 L.Ed.2d 702 (1998); *Zant v. Stephens*, 462 U.S. 862, 876 n.13, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983); *see Walton v. Arizona*, 497 U.S. 639, 651-52, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990). We also have particularly rejected appellant's argument that the military standard is unconstitutional. *See Loving*, 41 MJ at 291. No further action on this assignment of error is warranted. *See generally* RCM 1004(b)(4)(C); *see also Ortiz v. Stewart, supra.*

ISSUE XXXI

WHETHER THE MILITARY JUDGE ERRED IN VIOLATION OF THE FIFTH AND EIGHTH AMENDMENTS IN FAILING TO EXPLICITLY INSTRUCT THAT EVEN IF THE MEMBERS UNANIMOUSLY FOUND ONE OR MORE AGGRAVATING FACTORS AND EVEN IF THE MEMBERS UNANIMOUSLY DETER-

MINE THAT THE EXTENUATING OR MITIGATING CIRCUMSTANCES ARE SUBSTANTIALLY OUTWEIGHED BY THE AGGRAVATING FACTORS, EACH MEMBER STILL HAD THE ABSOLUTE DISCRETION TO DECLINE TO IMPOSE THE DEATH SENTENCE.

Appellant complains that the military judge should have expressly instructed the members concerning their absolute discretion to decide not to award the death penalty even if they determine he was eligible for that penalty. We find this argument to be without merit.

As pointed out by the appellate court below (37 MJ at 757), appellant's argument is not supported by the record. The military judge, responding to a question by the president of the court-martial, stated:

> MJ: Assuming you got to that point and you unanimously found, obviously that means by all vote—all being—all concurring, that the aggravating factors substantially outweighed all extenuating and mitigating factors, then you can proceed to vote on the remaining elements of the sentence. *You don't have to, indeed, even if you were to do that, you may—you may not have to—you may not be of the mind to impose the death penalty.* Assuming you reach those two stages, then your decision is: Shall we impose a sentence of death or life as to those two elements? *There's—the fact that you found unanimously as to both those factors does not dictate death be imposed. It's your decision,* but you can only impose a death sentence if you reach those two—go through those two stages unanimously.
>
> PRES: Okay, sir.

(Emphasis added.) This instruction substantially conveys the point urged by appellant in this assignment of error. *See Loving*, 41 MJ at 276-77.

ISSUE XXXII

WHETHER THE AGGRAVATING FACTOR STATED IN RCM 1004(c)(7)(1) IS VAGUE, FAILS TO SUFFICIENTLY CLARIFY THE FACTOR INVOLVED, AND DOES NOT NARROW THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY, AND IS THEREFORE INVALID UNDER THE EIGHTH AMENDMENT TO THE CONSTITUTION.

The version of RCM 1004(c)(7)(1) in effect at the time of trial provided:

> (c) *Aggravating factors.* Death may be adjudged only if the members find, beyond a reasonable doubt, one or more of the following aggravating factors:
>
> * * *
>
> (7) That, only in the case of a violation of Article 118(1):
>
> * * *
>
> (1) The murder was preceded by the intentional infliction of substantial physical harm or prolonged, substantial mental or physical pain and suffering to the victim[.]

Appellant, relying on *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), and *Maynard v. Cartwright*, 486 U.S. 356, 361-62, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), argues the above aggravating

factor is unconstitutionally vague under the Eighth Amendment. He contends that the word "substantial" in that Rule is too vague to provide meaningful guidance to the members in awarding the death penalty. *See Arnold v. State*, 224 S.E. 2d 386, 391-92 (Ga. 1976).

Appellant concedes that RCM 1004(c)(7)(I) might not be constitutionally vague. He states:

> The aggravating factor sufficiently channels discretion only *if it is viewed as contemplating physical harm or prolonged pain and suffering which preceded and was demonstrably separate and distinct from the acts which constituted the murder.*

Final Brief at 259 (emphasis added). He argues, however, that the military judge erred by not explaining this point to the members. *Id.* However, government counsel correctly notes this precise point was made clear to the members by the military judge. Answer at 110. The military judge advised the members as to this factor:

> that as to the Vickery—Laura Lee Vickery-Clay, that the premeditated murder of Laura Lee Vickery-Clay *was preceded* by the intentional infliction of substantial mental and physical pain and suffering to the victim; [and]
>
> that as to the premeditated murder of Kimberly Ann Ruggles, that the premeditated murder of Kimberly Ann Ruggles *was preceded* by the intentional infliction of substantial mental and physical pain and suffering of the victim[.]

(Emphasis added.)

We find no constitutional infirmity in the aggravating factor delineated in RCM 1004(c)(7)(I) and set out

above. *See Loving*, 41 MJ at 294; *see also Ortiz*, 149 F.3d at 942; *Duvall v. Reynolds*, 139 F.3d 768, 793 (10th Cir.), *cert. denied*, ___ U.S. ___, 119 S.Ct. 345, 142 L.Ed.2d 284 (1998). We also find no error in the judge's explanation of it. Finally, any error in this regard was unquestionably harmless beyond a reasonable doubt in view of the other aggravating factors found in this case. *See Zant*, 462 U.S. at 881 and 884, 103 S.Ct. 2733.

XXXIII

WHETHER THE MILITARY JUDGE COMMITTED PLAIN ERROR, AFFECTING SUBSTANTIAL RIGHTS OF APPELLANT, WHEN HE ALLOWED THE PANEL TO RECESS PRIOR TO ARRIVING AT A SENTENCE, DETERMINE A SENTENCE WHILE ON RECESS, AND REENTER THE COURTROOM TO ANNOUNCE THAT SENTENCE WITHOUT EVER CLOSING THE COURT TO DELIBERATE ON A SENTENCE; SUCH ERROR SERIOUSLY AFFECTED THE FAIRNESS, INTEGRITY, AND PUBLIC REPUTATION OF APPELLANT'S COURT-MARTIAL.

After the military judge's instructions on sentencing in this case, the president of the court-martial asked for a recess prior to going into deliberations. This recess lasted 11 minutes from 4:50 p.m. to 5:01 p.m. on April 11, 1988. At that point the court reassembled with all parties being present. The military judge then closed the court for deliberations. At 5:29 p.m., the court assembled with the members, and the military judge recessed the court for the night. The court reconvened at 9:05 a.m. on April 12, 1988, and the military judge clarified some instructions which he had previously given to the

members. At 9:14 a.m., the court was again closed for deliberations. At 10:20 a.m. April 12, 1988, the panel returned to the courtroom and requested a 15-minute recess. It then recessed at 10:21 a.m., and at 10:34 a.m. on April 12, 1988, the court came to order and the military judge asked the president if the court had "determined a sentence." The president said, "Yes, sir, it has," and gave it in written form to the military judge. The president later orally announced this sentence to appellant.

Appellant contends:

> The actions of the military judge in the present case, charging the court members with presentencing instructions, allowing them to recess, arrive at a sentence while on recess, and reenter the courtroom to announce sentence, all without ever closing to deliberate on sentence, are patently improper and created a fair risk of prejudice to SPC Gray's substantial rights. The military judge's oversight presented the court members with an opportunity to commit several potential evils, any of which create a fair risk of prejudice.[95]

Final Brief at 261.

Appellant's argument is not supported by the record. Early in this trial, the military judge instructed the members on their duties and how they must be performed, as follows:

---

[95] *E.g.* that all court members were not present to deliberate on sentence; that all court members were not present to vote; that one of the court members indulged in unauthorized communication with another court member or an interloper during break, or during deliberations; or, that unauthorized publications were taken into the closed session.

> You must keep an open mind throughout the trial, impartially hear the evidence, and only—and instructions on the law, *and only when you're in closed session deliberations may you properly make a determination* as to whether the accused is guilty or not guilty, and, should it become necessary, *as to an appropriate sentence.* Furthermore, with regard to sentencing, should it become necessary, you may not have any preconceived idea or formula as to either the type or amount of punishment that should be imposed based solely upon the fact of conviction for an offense alone. You must first hear the evidence in extenuation and mitigation, as well as that in aggravation, if any, and *only when you're in closed session deliberations may you properly arrive at an appropriate sentence,* should it become necessary, after considering all the alternative punishments, of which I will later advise you.

(Emphasis added.)

Later he added these instructions:

> *During any recess or adjournment you may not discuss the case among yourselves, nor may you discuss the case with anyone else.* You must not listen to or read any account of the trial, or consult any source, written or otherwise, as to matters involved in the case. *You must hold your discussions in the case until you are all together in closed session deliberations so that all the panel members have the benefit of your discussions.* If anyone attempts to discuss the case in your presence during any recess or adjournment, I want you to immediately tell them to stop,

> and immediately report that occurrence to me. We will try to estimate the times for recesses or hearings out of your presence. Frequently their duration is extended by considerations of new issues arising at such hearings. Your patience and understanding regarding these will contribute greatly to an atmosphere consistent with the fair administration of justice.
>
> When you're in closed session deliberations only the members will be present. You must remain together, and you may not allow any unauthorized intrusion into your deliberations.

(Emphasis added.)

Finally, prior to findings, he instructed the members as follows:

> The Uniform Code of Military Justice prohibits me or anyone else from entering your closed session deliberations. You may not consult the Manual for Courts-Martial or any other legal publications.
>
> If it's necessary for administrative reasons that your deliberations be interrupted by a recess for whatever reason, for anyone to depart the deliberations, it's necessary that we formally gather, formally recess, and then formally reassemble. This is an absolute legal requirement. And I would assume that the court would like to take a brief recess before you begin deliberations.

On this basis, we conclude that appellant's argument on this issue is without merit. *See also United States v. Jones*, 37 MJ 321, 324 (CMA 1993) (if error, no

structural defect; and no prejudice since members instructed on limitations for closed deliberations).

ISSUE XXXIV

WHETHER THE ARMY COURT ERRED BY REFUSING TO ABATE THE PROCEEDINGS IN APPELLANT'S CASE AFTER APPELLANT INGESTED AN OVERDOSE OF DOXIPIN.

The Court of Military Review summarily denied appellant's "motion to abate the proceedings" against him "to ensure that the appellant, as a result of an apparent drug overdose, had suffered no permanent brain damage which would prevent his full participation in assisting with his appeal." 37 MJ at 753. A basis for such action exists on the record before us. Def. App. Ex. B, which appellant relies on to raise this claim, also asserts that appellant's condition had stabilized and he apparently suffered "no permanent deficits" from this episode. *See United States v. Young*, 43 MJ 196 (1995).

ISSUE XXXV

WHETHER APPELLANT WAS DENIED HIS FIFTH AMENDMENT RIGHT TO A GRAND JURY PRESENTMENT OR INDICTMENT.

ISSUE XXXVI

WHETHER COURT-MARTIAL PROCEDURES DENIED APPELLANT HIS ARTICLE III RIGHT TO A JURY TRIAL.

The Court of Military Review rejected appellant's argument of a right to grand-jury presentment

because of the language of the Fifth Amendment and Supreme Court cases. 37 MJ at 754-55. It also rejected his argument of an Article III right to a jury trial on the basis of the Supreme Court's and our case law. *Id.* at 755; *see also Loving, supra* at 287; *Curtis*, 32 MJ at 267-68. No further consideration of this claim is warranted.

ISSUE XXXVII

WHETHER ARTICLE 18 OF THE UCMJ AND RCM 201(f)(1)(C), WHICH REQUIRE TRIAL BY MEMBERS IN A CAPITAL CASE, VIOLATE THE FIFTH AND EIGHTH AMENDMENT GUARANTEE OF DUE PROCESS AND A RELIABLE VERDICT.

This Court has resolved the above issue against the appellant in *Loving*, 41 MJ at 291 and *United States v. Matthews*, 16 MJ 354, 363 (CMA 1983). *See generally Singer v. United States*, 380 U.S. 24, 85 S.Ct. 783, 13 L.Ed.2d 630 (1965). We adhere to this position in appellant's case.

ISSUE XXXVIII

WHETHER, ASSUMING ARGUENDO THAT HE DESIRED TO PLEAD GUILTY, RCM 1004'S PROHIBITION-AGAINST GUILTY PLEAS IN CAPITAL CASES[8] DEPRIVED APPELLANT OF A CRITICAL MITIGATING FACTOR AND CAUSED OTHER IRREPARABLE PREJUDICE.

This issue was decided against appellant in *Loving*, 41 MJ at 292. There, this Court relied on its previous

[8]See Art. 45(b), UCMJ, 10 USC § 845(b).

decision in *Matthews*, 16 MJ at 362-63. We continue to adhere to this position. *See United States v. Dock*, 28 MJ 117 (CMA 1989).

ISSUE XXXIX

WHETHER APPELLANT WAS DENIED DUE PROCESS OF LAW IN VIOLATION OF THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, AND UCMJ ARTICLE 55, BECAUSE HE WAS TRIED IN A PEACETIME CAPITAL CASE BY A COURT-MARTIAL PANEL (I.E. JURY) COMPOSED OF LESS THAN TWELVE MEMBERS.

A majority of this Court has consistently rejected this argument as a matter of constitutional law. *Loving*, 41 MJ at 287; *Curtis*, 32 MJ at 267-68; *but see Curtis*, *supra* at 271 (Sullivan, C.J., concurring).

ISSUE XL

WHETHER APPELLANT WAS DENIED HIS RIGHTS UNDER THE FIFTH AND SIXTH AMENDMENTS BECAUSE THE PANEL-MEMBER SELECTION POOL IN APPELLANT'S CASE DID NOT INCLUDE ANY FEMALES.

Appellant did not raise this issue at trial. *See Gray*, 37 MJ at 759. He now asserts that the convening authority "deliberately" kept "women as a group off" his court-martial panel. Final Brief at 295. No statistical argument has been made to support this claim. Instead, appellant relies on the simple fact that no woman was detailed to sit on this court-martial panel. Such a showing is inadequate to establish this claim or plain error. *See Loving*, 41 MJ at 283-87; *see*

id. at 308-09 (Sullivan, C.J., concurring in part and in the result).

ISSUE XLI

WHETHER ARTICLE 25(c)(1)'S EXCLUSION FROM COURT-MARTIAL SERVICE OF ENLISTED MEMBERS OF THE SAME UNIT AS THE ACCUSED INJECTS AN IMPROPER CRITERION (ENLISTED STATUS) IN SELECTING THE MEMBERS POOL.

Appellant asserts that his Fifth Amendment right to due process of law was violated by Article 25(c)(1). It states:

> (c)(1) Any enlisted member of an armed force on active duty *who is not a member of the same unit as the accused* is eligible to serve on general and special courts-martial for the trial of any enlisted member of an armed force who may lawfully be brought before such courts for trial, but he shall serve as a member of a court only if, before the conclusion of a session called by the military judge under section 839(a) of this title (Article 39(a)) prior to trial or, in the absence of such a session, before the court is assembled for the trial of the accused, the accused personally has requested orally on the record or in writing that enlisted members serve on it. After such a request, the accused may not be tried by a general or special court-martial the membership of which does not include enlisted members in a number comprising at least one-third of the total membership of the court, unless eligible enlisted members cannot be obtained on

> account of physical conditions or military exigencies. If such members cannot be obtained, the court may be assembled and the trial held without them, but the convening authority shall make a detailed written statement, to be appended to the record, stating why they could not be obtained.

(Emphasis added.) Appellant notes that this same limitation does not apply to officer members and denies him cross-representation on his jury panel.

The "same command" exclusion or restriction on trial by enlisted men does not apply to trial by officers. However, an officer has no right to trial by enlisted persons. Moreover, this provision of law is not arbitrary or capricious. *See United States v. Wilson*, 21 MJ 193 (CMA 1986). Finally, appellant has not met his burden to show that this procedure violates the Fifth Amendment's Due Process Clause.

The Supreme Court in *Weiss v. United States*, 510 U.S. 163, 177-78, 114 S.Ct. 752, 761, 127 L.Ed.2d 1 (1994), noted the appropriate test to determine due process violations in court-martial procedure. It stated:

> We therefore believe that the appropriate standard to apply in these cases is found in *Middendorf, supra*, where we also faced a due process challenge to a facet of the military justice system. In determining whether the Due Process Clause requires that service members appearing before a summary court-martial be assisted by counsel, we asked "whether the factors militating in favor of counsel at summary courts martial are so extraordinarily weighty as to overcome the balance struck by Congress." 425 U.S., at 44, 96 S.Ct. 1281. We ask the same question here with

respect to fixed terms of office for military judges.

Appellant has not even proffered such an analysis in this case and, therefore, no relief is required on this basis.

ISSUE XLII

WHETHER APPELLANT WAS DENIED HIS RIGHT TO AN IMPARTIAL JURY BY THE ACCEPTED PRACTICE IN THE MILITARY OF ALLOWING PANEL MEMBERS TO ASK QUESTIONS OF WITNESSES.

Mil.R.Evid. 614(b) provides:

> *(b) Interrogation by the court-martial.* The military judge or members may interrogate witnesses, whether called by the military judge, the members, or a party. Members shall submit their questions to the military judge in writing so that a ruling may be made on the propriety of the questions or the course of questioning and so that questions may be asked on behalf of the court by the military judge in a form acceptable to the military judge. When a witness who has not testified previously is called by the military judge or the members, the military judge may conduct the direct examination or may assign the responsibility to counsel for any party.

There is no federal civilian counterpart to this rule. However, the practice of court member questioning is of long standing at courts-martial. *See* W. Winthrop, *Military Law and Precedents* 178 (2d ed. 1920 Reprint), and reluctantly recognized in a majority of

jurisdictions. *See United States v. Martinsmith*, 41 MJ 343, 348 n.5 (CMA 1994); *but see Morrison v. State*, 845 S.W. 2d 882, 884 n.5 (Tex. Crim. App. 1992). We are not persuaded by appellant's argument that such questioning renders a member partial or biased as a matter of law. Allowing questions by a juror is a good way to have a more informed juror—one who is in a better position to determine the truth in a trial. Moreover, looking at the process in this case, the court-martial members in this trial record of over 2500 pages asked only 39 questions, only one of which was objected to by the parties. (R. 1921) Accordingly, this argument is also unsupported as a matter of fact and law in this case.

ISSUE XLIII

WHETHER APPELLANT WAS DENIED DUE PROCESS OF LAW WHEN THE MILITARY JUDGE IMPROPERLY ABANDONED HIS ROLE OF IMPARTIALITY AND BECAME A PARTISAN ADVOCATE FOR THE GOVERNMENT.

Appellant asserts that "the military judge repeatedly abandoned his role of impartiality and acted as a partisan advocate for the Government." Final Brief at 301. He then notes six examples of this supposedly pro-government conduct, as follows:

> *See, e.g.*, R. at 158-61 (military judge characterizes defense questions as "fishing expedition"), R. at 433-36 (military judge criticizes defense counsel for not interviewing unavailable witness), R. at 513-14 (military judge attacks defense counsel's legitimate *voir dire* question), R. at 678 (military judge flippantly insults defense counsel concerning

challenge for cause of member), R. at 940 (military judge acting as government advocate concerning questioning of witness), R. at 2498 (military judge disregarding defense counsel attempt at explaining alternate perception theory).

Final Brief at 301. We have examined the record of trial concerning these purported incidents of judicial bias and find no abandonment by the judge of his impartial role. *See United States v. Reynolds*, 24 MJ 261, 265 (CMA 1987). We further note that the members were not present during any of these incidents.

The first comment by the military judge concerned a defense request for investigative services by CID and the CID Commander's response to that request. We note that the judge used this expression two times in this context. (R. 158, 160.) However, we are also aware that it is a commonly used term of art describing a general request for information favorable to one's client without any basis for concluding such information exists. *See United States v. Irwin*, 30 MJ 87, 94 (CMA 1990), *quoting United States v. Enloe*, 15 USCMA 256, 262, 35 CMR 228, 234 (1965); *United States v. Hagen*, 25 MJ 78, 85 (CMA 1987), *cert. denied*, 484 U.S. 1060, 108 S.Ct. 1015, 98 L.Ed.2d 981 (1988).

Appellant's second challenge to the military judge's impartiality rests on his purported criticism of defense counsel's failure to interview possible defense witnesses concerning a fire in the car of Ms. Vickery-Clay. These comments were made in the context of a defense request to reveal the identity of a government source as a witness to that fire during a hearing to determine whether such action was necessary. This comment was not biased or inappropriate in light of the constitutional standard of necessity. *See Roviaro v. United States*, 353

U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957).

The third challenged comment by the judge concerned a question asked by defense counsel on *voir dire*. The record states:

> DC: What kind of first degree, premeditated murders would you not vote for a death sentence on?
>
> COL CUSICK: I don't know. I don't know how many kinds there are. I don't understand the question maybe.
>
> DC: Okay, of the great range of premeditated murders, from the worst to the least aggravated, are there premeditated murders—even the least aggravated—that you would vote for a life sentence as versus a death sentence?—or would it have to be second degree, or unpremeditated murder, or something like that?
>
> COL CUSICK: I don't know. I don't know if I can make that distinction. I'd have to hear, you know, matters in extenuation and mitigation, and after that make—if guilt was determined, then I'd have to listen to the extenuating and mitigating circumstances before I could say whether I would go for other than a death penalty.

Subsequent to this questioning, outside the presence of the members, the military judge suggested to defense counsel a more effective way to communicate a question concerning the "various ranges of premeditated murder" to a layman. The military judge also criticized a *voir dire* question of trial counsel on clarity grounds. Moreover, the following colloquy makes it obvious that

his comments applied to both counsel:

> MJ: Well, you can't get their feelings until such time as you define for them what you're talking about. The same is true about your questions as well, counsel (to trial counsel). I want you people to bear in mind, put yourself in their position, "How could I answer this question?"...
>
> * * *
>
> MJ: Make your questions clearer. Try to give them questions—and obviously, we're all searching for a witness [sic] who has no bias, who has no pre-knowledge, and I'm of the mind they're going to give us honest answers. I certainly hope so because we have to assume they will. But make the question such that—pose it so that you, if you were the individual, could answer it in an intelligent, informative manner. And that's why I say you'll have time to contemplate it. We're in recess.

Any suggestion of bias in these circumstances is illusory.

The fourth comment by the judge is again on the problem of intelligible *voir dire* questions. After a defense challenge for cause against Major Peterson, the military judge said:

> MJ: I think he's—his difficulty with the mitigating factors is your inability to intelligently articulate it. The challenge for cause is denied.
>
> Call Major Lewis in.
>
> You ought to—I've just told you you've got to talk to these folks—and indeed, if you want to talk about mitigating factors and how they're going to weigh it, why don't you give them a

> scenario to base it on. Ask a man what mitigating factors would make him change his mind. Put yourself in their positions, what mitigating factors would? You've got to know what the factors are. If you want to use it, use the checklist in the Benchbook as an example, go down and check it off for them. Call him in.

We see no flippant insult in this context and, for reasons noted above, we see no bias in these comments.

The fifth challenged comment of the military judge concerns his response to a challenge of trial counsel's questioning of a government witness, Special Agent Billiter, referring several times to one of the charged crimes "as a murder." The military judge denied that request, saying:

> MJ: Well, I don't mind his characterization of that. Indeed, that's what the Government says it is. His characterization don't [sic] make it so. I won't instruct him to say something different.

We see no partiality in this comment.

The final challenge concerns the military judge's alleged disregard of defense counsel's attempt to explain his perception of a witness' previous testimony. The question at issue was whether a defense-proffered videotape of life in a Miami ghetto, where appellant grew up, was relevant on sentencing. This colloquy ensued:

> DC: Your Honor, could I recall Doctor Armitage in a 39(a) to go over a couple more of these questions to determine if there's relevancy?
>
> MJ: I've already established, in my view, the relevant—the lack of relevancy is already established. The evidence before the court is to the effect that Gray was not affected factually by his environment and, so, it's of no

consequence.

DC: That was not my perception from the witnesses.

MJ: Well, I don't have any other perception. Maybe I'm in—wrong. Maybe I'm in error, but I will not allow the exhibit to be shown. You've recorded for posterity.

DC: Yes, sir. That's it.

Denial of admission of evidence on relevance grounds does not alone establish bias against the defense.

ISSUE XLIV

WHETHER APPELLANT KNOWINGLY AND INTELLIGENTLY WAIVED HIS ARTICLE 38(b)(2) STATUTORY RIGHT TO CIVILIAN COUNSEL OR HIS ARTICLE 38(b)(3)(B) STATUTORY RIGHT TO MILITARY COUNSEL OF HIS OWN SELECTION WHERE THE MILITARY COUNSEL FAILED TO ADVISE APPELLANT OF HIS PROFESSIONAL DEFICIENCIES (WHICH INCLUDED NO CAPITAL EXPERIENCE, NO CAPITAL TRAINING, AND NO EXPERIENCE IN DEFENDING A MURDER CHARGE) AND FAILED TO ADVISE APPELLANT THAT HE HAD DETAILED HIMSELF TO THE CASE.

ISSUE XLV

WHETHER APPELLANT KNOWINGLY AND INTELLIGENTLY WAIVED HIS ARTICLE 38(b)(2) STATUTORY RIGHT TO CIVILIAN COUNSEL OR HIS ARTICLE

38(b)(3)(B) STATUTORY RIGHT TO MILITARY COUNSEL OF HIS OWN SELECTION WHERE THE MILITARY JUDGE MISLED APPELLANT BY STATING THAT HIS COUNSEL WERE "QUALIFIED LAWYERS" AND THAT HIS LEAD COUNSEL WAS A "LAWYER OF CONSIDERABLE EXPERIENCE," WHEN NEITHER COUNSEL HAD TRIED A CAPITAL CASE, TRIED A MURDER CASE, OR RECEIVED ANY DEATH PENALTY CONTINUING LEGAL EDUCATION.

ISSUE XLVI

WHETHER DUE PROCESS REQUIRES THAT THIS COURT ESTABLISH MINIMUM STANDARDS FOR TRIAL AND APPELLATE DEFENSE COUNSEL IN CAPITAL CASES.

ISSUE XLVII

WHETHER THE SYSTEM OF APPOINTING CAPITAL COUNSEL IN THE UNITED STATES ARMY PREJUDICED APPELLANT BECAUSE HE IS NOT GUARANTEED EITHER CONTINUITY OF COUNSEL OR COMPETENT COUNSEL UNDER ANY OF THE QUALIFICATIONS FOR CAPITAL ATTORNEYS IN FORCE IN ANY JURISDICTION IN AMERICA.

The premise of appellant's unintelligent-waiver arguments is his assertion that his trial defense counsel believed himself unqualified to represent him in this capital case. Based on trial defense counsel's post-trial

affidavit, he asserts: "It appears that Captain Brewer questioned his ability to competently represent SPC Gray (Def. App. Exh. L), yet failed to advise his client of this fact. His failure to do so prevented SPC Gray from knowingly and fully exercising his right to counsel under Article 38, UCMJ." Final Brief at 303. We disagree.

In that post-trial affidavit trial defense counsel stated the following:

> 4. I was very concerned that SPC Gray receive the best quality of legal representation possible in this death penalty case. In fact, in December of 1987 I wrote the Ethics Committee of the Florida Bar, my licensing state, and asked for an advisory opinion on whether I was qualified to represent SPC Gray in a capital case. The advisory opinion in a nutshell was "if in my professional judgment after careful evaluation I could provide competent representation it would be ethical for me to continue." I decided to continue representing SPC Gray. An Individual Military Counsel was assigned to help represent SPC Gray, and Captain Craig Teller and I shared the responsibility of defending SPC Gray at his court-martial. Captain Teller took no part in working with the psychologists and psychiatrists in this case, as this was my area of responsibility.

The first issue assigned above has no merit as a matter of law or fact in appellant's case. The legal predicate for this duty-to-inform argument asserted by appellant is *United States v. Thomas*, 33 MJ 694 (ACMR 1991). There the Court of Military Review stated:

> If a lawyer believes he cannot represent a client competently, he should so inform the client and withdraw from representation subject to protection of the client's interest and the approval of the court. *See generally* Dep't of Army Pam 27-26, Rules of Professional Conduct for Lawyers, Rule 1.16 (31 Dec. 87); and Model Rules of Professional Conduct Rule 116 (1983) (amended 1990.)

33 MJ at 701-02. Appellant's argument, however, rests on the apparent existence of a question as to competence rather than an actual belief of the same. No authority whatsoever is proffered for the necessity of a warning in the former circumstances. In addition, we note that military defense counsel's affidavit is not only post-trial but stops short of asserting or implying his belief in his inability to handle this case.

Appellant also argues that the military judge had a duty to inform him about trial defense counsel's total inexperience in capital and murder cases, and their lack of death penalty continuing legal education. Moreover, he asserts that he clearly breached that duty when he labeled these lawyers "qualified" and "of considerable experience." As a result, he asserts that he did not knowingly and intelligently waive his right to civilian counsel under Article 38(b)(2) or individual military counsel under Article 38(b)(3)(B). No legal authority is offered to support this argument, and we cannot draw such authority from our decisions in *United States v. Johnson*, 21 MJ 211 (1986), or *United States v. Donohew*, *18* USCMA 149, 39 CMR 149 (1969). *See generally United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). We are satisfied that counsel possessed the necessary qualifications.

The final two issues address the process of appointing

defense counsel and appellate defense counsel in capital cases in the military justice system. First, appellant asserts that there should be minimum standards established for such defense counsel before they can practice at capital courts-martial. Second, he asserts that a system without such standards denies him due process of law under the Fifth Amendment. *See Medina v. California, 505* U.S. 437, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992). We reject this argument.

We initially note that the Supreme Court has spoken on the question of establishing minimum standards for qualifications in death-penalty cases. It said:

> We consider in this case only the commands of the Constitution. We do not pass on the wisdom or propriety of appointing inexperienced counsel in a case such as this. *It is entirely possible that many courts should exercise their supervisory powers to take greater precautions to ensure that counsel in serious criminal cases are qualified. See generally,* e.g., Committee to Consider Standards for Admission to Practice in Federal Courts, Final Report, 83 F.R.D. 215 (1979); Bazelon, The Defective Assistance of Counsel, 42 U.Cin.L.Rev. 1, 18-19 (1973); Berger, The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?, 42 Ford.L.Rev. 227 (1973); Burger, Some Further Reflections on the Problem of Adequacy of Trial Counsel, 49 Ford.L.Rev. 1 (1980); Schwarzer, Dealing with Incompetent Counsel—The Trial Judge's Role, 93 Harv.L.Rev. 633 (1980). *We address not what is prudent or appropriate, but only what is constitutionally compelled.*

Cronic, 466 U.S. at 665 n.38, 104 S.Ct. 2039 (emphasis

added).

Accordingly, for the reasons stated in *Loving*, 41 MJ at 300, we again decline the invitation to establish such a standard on our own. Nevertheless, on a case-by-case basis, we remain vigilant as to the quality of representation provided service members in capital cases in the military justice system. *Id.; see generally Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

As for appellant's second argument based on *Medina v. California, supra*, we also must reject it. The test for determining systemic due process violations in the military justice system is found in *Middendorf v. Henry*, 425 U.S. 25, 44, 96 S.Ct. 1281, 47 L.Ed.2d 556 (1976). *See Weiss*, 510 U.S. at 177, 114 S.Ct. at 760-61 *(Medina* does not control these questions in the military context.) No argument on this basis has been presented to this Court. In addition, despite 21 USC § 848(q)(5)-(7), the few state authorities cited by appellant in his brief, and the American Bar Association Guidelines, we are not persuaded that "[c]ontemporary practice" demonstrates a "settled view" on this question. *See Medina*, 505 U.S. at 447-48, 112 S.Ct. at 2578. Finally, a similar argument *(see* issue XLVII, *supra)* has been previously rejected by this Court in *Loving*, 41 MJ at 298-99.

ISSUE XLVIII

WHETHER APPELLANT HAS BEEN DENIED EQUAL PROTECTION UNDER THE LAW IN VIOLATION OF THE FIFTH AMENDMENT IN THAT ALL OTHER CIVILIANS IN THE UNITED STATES ARE AFFORDED THE OPPORTUNITY TO

HAVE THEIR CASES REVIEWED BY AN ARTICLE III COURT, BUT MEMBERS OF THE UNITED STATES ARMY BY VIRTUE OF THEIR STATUS AS SERVICE MEMBERS ARE NOT.

This argument was considered and rejected in *Loving*, 41 MJ at 295-96. We adhere to that holding in appellant's case.

ISSUE XLIX

WHETHER THIS COURT OR THE ARMY COURT HAVE JURISDICTION OR THE AUTHORITY TO REVIEW THE CONSTITUTIONALITY OF THE RULES FOR COURTS MARTIAL AND THE UNIFORM CODE OF MILITARY JUSTICE BECAUSE THIS COURT IS AN ARTICLE I COURT, NOT AN ARTICLE III COURT WHICH HAS THE POWER TO CHECK CONGRESS AND THE EXECUTIVE UNDER *MARBURY V. MADISON*, 5 U.S. (1 Cranch) 137 (1803).

We reject this argument. *See Loving*, 41 MJ at 296. The position of this Court on this issue was articulated by Chief Judge Everett in *Matthews*, 16 MJ at 364-68. We continue to adhere to this view.

ISSUE L

WHETHER THE MILITARY JUDGE ERRED IN VIOLATION OF THE FIFTH AND EIGHTH AMENDMENTS AND UCMJ ARTICLE 55 IN HIS FAILURE TO INSTRUCT THE PANEL MEMBERS THAT THE ONLY OFFENSES FOR WHICH

APPELLANT COULD BE SENTENCED TO DIE WERE FELONY MURDER AND PREMEDITATED MURDER AND THAT APPELLANT COULD NOT BE SENTENCED TO DIE ON THE BASIS OF THE AGGREGATE OR CUMULATIVE EFFECT OF ALL THE OFFENSES.

Appellant asserts that the military judge erred by failing to instruct the members "that death was an authorized sentence *only* for the offenses of premeditated murder and felony murder." Final Brief at 323. He grounds such a duty to instruct on the Fifth and Eighth Amendments and Article 55. He further asserts that appellant was prejudiced by this failure to instruct because

> appellant may have been sentenced to die because the panel members felt that, although appellant did not deserve to die for the specific capital crimes he was convicted of, he did deserve to die when the additional offenses of rape, robbery, burglary, and larceny were thrown into the equation. This latter result is clearly improper and cannot be discounted in this case.

Final Brief at 324. He cites decisions of this Court in *United States v. Wheeler*, 17 USCMA 274, 277, 38 CMR 72, 75 (1967); *United States v. Yocum*, 17 USCMA 270, 273, 38 CMR 68, 71 (1967); *United States v. Hutton*, 14 USCMA 366, 370, 34 CMR 146, 150 (1964).

Appellant's argument is not supported in law or fact. As a starting point, we note that no legal authority has been cited to this Court which prohibits the members from considering appellant's other crimes in their decision to impose the death penalty. In any event, the military judge early on in this case told the members

that this was a capital murder case permitting the death penalty. Moreover, prior to findings, he told the members that whether the vote for the premeditated murders and the felony murders was unanimous should be announced. Also, the military judge instructed the members that, "in view of your findings, the court is authorized to adjudge a sentence of death or life imprisonment only, with other types of punishments . . . ." Finally, appellant did not object to these instructions on the basis asserted on this appeal or specifically request the complained about missing instructions. See RCM 1005(f) (rule of waiver for sentencing instructions); *cf.* Art. 51(c), UCMJ, 10 USC § 851(c). In this context, we conclude that there is no "reasonable likelihood" that the members of this court-martial were acting in any unconstitutional manner. *See also Boyde*, 494 U. S. at 380, 110 S.Ct. 1190.

LI

WHETHER THERE IS NO MEANINGFUL DISTINCTION BETWEEN PREMEDITATED AND UNPREMEDITATED MURDER IN THE MILITARY, ALLOWING DIFFERENTIAL TREATMENT AND SENTENCING DISPARITY IN VIOLATION OF THE FIFTH AND EIGHTH AMENDMENTS.

LII

WHETHER THE MILITARY JUDGE ERRED BY INSUFFICIENTLY DESCRIBING THE DISTINCTION BETWEEN THE OFFENSES OF PREMEDITATED AND UNPREMEDITATED MURDER.

The first issue noted above asserts as its premise that there is no meaningful distinction in military law between premeditated murder and unpremeditated murder. We implicitly resolved this question long ago in *United States v. Teeter*, 16 MJ 68, 71-72 (1983). More recently in a capital-case context we again resolved this question contrary to appellant's argument. *Loving*, 41 MJ at 279-80. Accordingly, we conclude that appellant's argument on this issue must again be rejected.

The second issue noted above focuses on the military judge's instructions explaining the distinction between premeditated murder and unpremeditated murder. We note that appellant did not object at trial to the instructions on this matter given by the judge or proffer a substitute. 37 MJ at 759. Moreover, the judge gave the following instruction on the difference between the two types of murder:

> You'll notice that the principal difference between this offense—that is, premeditated murder—and unpremeditated murder is that there would-the accused must have had the premeditated design to kill, that is, had considered the act prior to the application of the force and must have had the specific intent to kill, whereas unpremeditated murder requires the specific intent to kill or inflict great bodily harm without premeditation.

We approved such an instruction in *Teeter*, *supra* at 71-72, absent any objection by the defense. In this context and in view of the overwhelming evidence of premeditation in this case we find no error on this basis. *Loving*, 41 MJ at 280.

LIII

WHETHER THE PREDOMINANCE OF MISLEADING LANGUAGE IN THE REASONABLE-DOUBT INSTRUCTIONS GIVEN BY THE MILITARY JUDGE FOR FINDINGS AND SENTENCING CREATED A HIGHER DEGREE OF DOUBT THAN IS REQUIRED UNDER THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

Appellant notes that the military judge in this case gave the following instruction on reasonable doubt:

> A "reasonable doubt" is what the words imply, a doubt founded in reason. It is not a fanciful or ingenious doubt, or conjecture, but an honest conscientious doubt suggested by the material evidence or lack of it in the case. It is an honest misgiving caused by the insufficiency of proof of guilt. "Proof beyond reasonable doubt" means *proof to a moral certainty,* although not necessarily an absolute or mathematical certainty. A reasonable doubt is a *doubt which would cause a reasonably prudent person to hesitate to act in the more important and weighty of his own personal affairs.* The proof must be such as to exclude not every hypothesis or possibility of innocence but every fair and rational hypothesis except that of guilt. The rule as to reasonable doubt extends to every element of the offense, although each particular fact advanced by the prosecution which does not amount to an element need not be established beyond reasonable doubt. However, if on the whole evidence you are satisfied beyond a reasonable doubt of the truth of each and

> every element, you should find the accused guilty.

(Emphasis added.) He further notes that a similar instruction was given on sentencing concerning the existence of aggravating factors. (R. 2561-62) Relying on *Cage v. Louisiana*, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990), and several of the separate opinions of the Justices in *Victor v. Nebraska*, 511 U.S. 1, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994), he asserts that these instructions were constitutionally defective, so his conviction and sentence must be reversed. *See Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993).

We note that the reasonable-doubt instruction in appellant's case was taken from paragraph 2-29.1 of the Military judges' Benchbook at 2-34 (Oct 1986). A similar instruction was approved by this Court in *United States v. Meeks*, 41 MJ 150, 155-57 (1994). We also note that appellant did not object to this instruction or offer an alternative. *See United States v. Robinson*, 38 MJ 30 (CMA 1993). In our view there was no reasonable probability that appellant's court-martial members used a lower standard of guilt or a higher standard for acquittal than required by law. *Victor v. Nebraska, supra; see Loving*, 41 MJ at 281.

LIV

WHETHER THE MILITARY JUDGE'S INSTRUCTIONS RESTRICTED FREE CONSIDERATION OF THE EVIDENCE BY REQUIRING THE MEMBERS TO VOTE ON THE MOST SERIOUS OFFENSE FIRST.

Appellant asserts that the voting-procedure instructions given by the military judge in this case

restricted the members' free consideration of the evidence. In particular he complains that requiring the members to vote on the greater more serious offense first precluded their full and fair consideration of lesser-included offenses. He contends that the risk of danger in this regard is greatest in savage murder cases because they naturally call for the "maximum denunciation." *See Austin v. United States*, 382 F.2d 129, 138 (D.C. Cir. 1967).

We initially note that appellant does not support his argument with any authority except *Austin v. United States, supra.* That case does not support creation of a new rule for voting on findings in murder cases, but only comments in dicta on the natural unrestrained tendencies of the layman as compared to a judge. 382 F.2d at 138-39. We also note that the challenged instructions are based on RCM 921(c)(5),[9] which states:

> (5) *Included offenses.* Members shall not vote on a lesser included offense unless a finding of not guilty of the offense charged has been reached. If a finding of not guilty of an offense charged has been reached the members shall vote on each included offense on which they have been instructed, in order of severity beginning with the most severe. The members shall continue to[10] vote on each included offense on which they have been instructed until a finding of guilty

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[9] At the time of the offense, this was RCM 921(c)(4), but as of March 12, 1987, it was renumbered as RCM 921(c)(5). See Exec. Order No. 12586 §§ l[L] & 5, 52 Fed. Reg. 7106 & 7112.

[10] Change 2 to the Manual for Courts-Martial (15 May 1986) contains the correct word ("to"); beginning with Change 3 (I June 1987) the word "the" is erroneously substituted. This error is contained in the 1995 and 1998 edition.

> results or findings of not guilty have been reached as to each such offense.

We fail to appreciate any real prejudice that appellant may suffer as a result of this procedure, and appellant has not made a legally sufficient denial-of-due process argument in this regard. *See Weiss v. United States*, 510 U.S. 163, 114 S.Ct. 752, 127 L.Ed.2d 1 (1994). Accordingly, we resolve this issue against appellant.

LV

WHETHER DESIGNATION OF THE SENIOR MEMBER AS THE PRESIDING OFFICER FOR DELIBERATIONS ESTABLISHES THE SENIOR MEMBER'S SUPERIORITY IN AND CONTROL OF THE DELIBERATION PROCESS AND DENIED APPELLANT DUE PROCESS OF LAW AND A FAIR AND IMPARTIAL CONSIDERATION OF THE EVIDENCE BY THE MEMBERS.

RCM 502(b)(1) states:

> (b) *President.*
>
> (1) *Qualifications.* The president of a court-martial shall be the detailed member senior in rank then serving.
>
> (2) *Duties.* The president shall have the same duties as the other members and shall also: (A) Preside over closed sessions of the members of the court-martial during their deliberations;
>
> (B) Speak for the members of the court-martial when announcing the decision of the

members or requesting instructions from the military judge; and

(C) In a special court-martial without a military judge, perform the duties assigned by this Manual to the military judge except as otherwise expressly provided.

It is a traditional practice at courts-martial since at least 1828. *See* W. Winthrop, *Military Law and Precedent* 170 (2d ed. 1920 Reprint). Moreover, the members of appellant's court-martial were instructed on their "equal voice" with the president of the court-martial in discussing, deciding, and voting. They were also instructed that "[t]he influence of superiority in rank will not be employed in any manner to attempt to control the independence of members in the exercise of their own personal judgment." In these circumstances, appellant has failed to establish a due process violation resulting from the designation of the president of the court-martial. *See Weiss v. United States, supra.*

LVI

WHETHER THE MILITARY JUDGE'S INSTRUCTION THAT "YOU MAY NOT ADJUDGE A SENTENCE OF DEATH UNLESS YOU FIND THAT ANY AND ALL EXTENUATING [AND] MITIGATING [FACTORS] ARE SUBSTANTIALLY OUTWEIGHED BY ANY AGGRAVATING FACTORS..." DID NOT SUFFICIENTLY INFORM THE MEMBERS THAT THIS FINDING MUST BE UNANIMOUS.

Appellant's basic argument is that the military judge's sentencing instructions could be construed to permit a less-than-unanimous finding by the members on the

weighing death-eligibility question. The record as a whole does not support this argument. It[11] states:

> Your deliberation on the aggravating factors should properly include a full and free discussion of all the evidence that's been presented. After you've completed your discussion, then voting on the—each aggravating factor must be accomplished by secret written ballot. All members are required to vote. If *you fail to find unanimously that at least one of the aggravating factors existed, then you may not adjudge a* sentence of death. If, however, you determine that at least one of the aggravating factors existed, then you may consider, along with all other appropriate sentence possibilities, whether a sentence of death should be adjudged. In this regard, *you may not adjudge* a sentence of death *unless you find, by unanimous vote—again, by all members—that any and all extenuating and mitigating factors are substantially outweighed by any aggravating factors,* including the factors which you've previously found existed in the first step of this procedure. Thus, in addition to the aggravating factors that have been found by unanimous vote—assuming you do—you may consider the following aggravating factors as well:
>
> [list of factors omitted].

---

[11] Certain instructional language was omitted from the assigned issue but was included in the first paragraph of the discussion of this issue in his brief. Final Brief at 346.

(R. 2562-63) (emphasis added). The "you singular" or "you plural" ambiguity argument also posited by appellant, Final Brief at 347, is not a reasonable likelihood in these circumstances. *See generally Victor v. Nebraska*, 511 U.S. 1, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994).

LVII

WHETHER THE MILITARY DEATH PENALTY SCHEME IS INVALID DUE TO *FURMAN V. GEORGIA*, 408 U.S. 238 (1972), AND THE SEPARATION OF POWERS DOCTRINE.

This is the fourth time this issue has been presented to this Court. *Loving*, 41 MJ at 293; *United States v. Curtis*, 32 MJ 252 (CMA), *cert. denied*, 502 U.S. 952, 112 S.Ct. 406, 116 L.Ed.2d 354 (1991), *and Matthews*, 16 MJ at 381. The Supreme Court has resolved this issue in the Government's favor. *Loving v. United States*, 517 U.S. 748, 116 S.Ct. 1737, 135 L.Ed.2d 36 (1996).

LVIII

WHETHER RCM 1004 FAILS TO INCORPORATE CONGRESSIONALLY MANDATED PROTECTIONS TO PREVENT RACIALLY MOTIVATED IMPOSITION OF THE DEATH PENALTY IN VIOLATION OF UCMJ ARTICLE 55 AND THE EIGHTH AMENDMENT TO THE CONSTITUTION.

LIX

WHETHER THE MILITARY JUDGE COMMITTED PLAIN ERROR WHEN HE FAILED TO *SUA SPONTE* INSTRUCT

THE PANEL MEMBERS THAT RACE COULD NOT BE CONSIDERED AS A FACTOR IN THE SENTENCING PROCESS.

Appellant calls this Court's attention to 21 USC § 848(o)(1), which states:

> (o) Right of the defendant to justice without discrimination
>
> (1) In any hearing held before a jury under this section, the court shall instruct the jury that in its consideration of whether the sentence of death is justified it shall not consider the race, color, religious beliefs, national origin, or sex of the defendant or the victim, and that the jury is not to recommend a sentence of death unless it has concluded that it would recommend a sentence of death for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant, or the victim, may be. The jury shall return to the court a certificate signed by each juror that consideration of the race, color, religious beliefs, national origin, or sex of the defendant or the victim was not involved in reaching his or her individual decision, and that the individual juror would have made the same recommendation regarding a sentence for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant, or the victim, may be.

This provision of federal law was enacted after appellant's court-martial (November 18, 1988 - 102 Stat. 4545). It is not constitutionally mandated. *Loving*, 41 MJ at 274. Finally, this provision of law is specifically limited in its application to offenses under 21 USC.

LX

WHETHER IMPOSITION OF THE DEATH PENALTY IN THIS CASE VIOLATED APPELLANT'S RIGHT TO EQUAL PROTECTION UNDER THE FIFTH AMENDMENT BECAUSE RCM 1004 SUBJECTS APPELLANT, AS A MEMBER OF THE ARMED FORCES, TO A PENALTY WHICH IS NOT OTHERWISE AVAILABLE UNDER THE CRIMINAL CODE OF THE UNITED STATES FOR IDENTICAL CRIMINAL CONDUCT.

Article 118 authorizes imposition of the death penalty in this case. *Cf.* 21 USC § 848(e). Article 118, as it read at the time of trial, stated:

> § 918. Art. 118. Murder
>
> Any person subject to this chapter who, without justification or excuse, unlawfully kills a human being, when he—
>
> (1) has a premeditated design to kill;
>
> (2) intends to kill or inflict great bodily harm;
>
> (3) is engaged in an act which is inherently dangerous to others and evinces a wanton disregard of human life; or
>
> (4) is engaged in the perpetration or attempted perpetration of burglary, sodomy, rape, robbery, or aggravated arson; is guilty of murder, and shall suffer such punishment as a court-martial may direct, except that if found guilty under clause (1) or (4), he shall

> suffer death or imprisonment for life as a court-martial may direct.

RCM 1004 further delineates the capital-sentencing procedures at courts-martial. For the reasons stated in *Loving*, 41 MJ at 294, we reject appellant's equal protection argument.

LXI

WHETHER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS DO NOT PERMIT, IN PEACETIME, A CONVENING AUTHORITY TO HAND-PICK MILITARY SUBORDINATES, WHOSE CAREERS HE CAN DIRECTLY AND IMMEDIATELY AFFECT AND CONTROL, TO SERVE AS MEMBERS IN A CAPITAL TRIAL FOR OFFENSES THAT OCCUR ON A MILITARY BASE BUT WHERE THERE IS CONCURRENT JURISDICTION WITH A STATE AUTHORITY.

Article 25(d) states:

> (1) When it can be avoided, no member of an armed force may be tried by a court-martial any member of which is junior to him in rank or grade.
>
> (2) When convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament. No member of an armed force is eligible to serve as a member of a general or special court-martial when he is the

> accuser or a witness for the prosecution or has acted as investigating officer or as counsel in the same case.

Appellant's constitutional arguments not only ignore Article 37, UCMJ, 10 USC § 837, but the decision of the Supreme Court in *Weiss v. United States*, 510 U.S. 163, 114 S.Ct. 752, 127 L.Ed.2d 1 (1994). *See United States v. Graf*, 35 MJ 450 (CMA 1992), *cert. denied*, 510 U.S. 1085, 114 S.Ct. 917, 127 L.Ed.2d 206 (1994), and *United States v. Mabe*, 33 MJ 200 (CMA 1991). We again reject these arguments. *See Loving*, 41 MJ at 297.

LXII

> WHETHER THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT BY ALLOWING THE PROSECUTION, DURING THE SENTENCING PORTION OF A CAPITAL CASE, TO ENGAGE IN IMPROPER ARGUMENT THAT EMPHASIZED VICTIM IMPACT STATEMENTS IN VIOLATION OF *BOOTH V. MARYLAND*, 482 U.S. 496 (1987). *BUT SEE PAYNE V. TENNESSEE*, 501 U. S. 808, 111 S. Ct. 2597 (1991).

Appellant in his final brief offers no specifics on this issue. Trial counsel's argument did make reference to the rights of the two murder victims and their friends and relatives (R. 2539, 2537) and he referred to the pain and anguish suffered by the victims prior to their deaths. This was not legal error. *Payne* overruled *Booth*. *See* 37 MJ at 739; *see also Loving*, 41 MJ at 292.

LXIII

WHETHER MILITARY DUE PROCESS AND FUNDAMENTAL NOTIONS OF FAIRNESS REQUIRE THAT EACH MEMBER OF THE COURT-MARTIAL SIGN HIS OR HER NAME TO THE DEATH-SENTENCE WORKSHEET OR THAT THE CONDEMNED ACCUSED BE AFFORDED THE RIGHT AND OPPORTUNITY TO POLL THE MEMBERS. *SEE UNITED STATES V CURTIS*, 33 MJ 101, 110 (COX, J., CONCURRING). *BUT SEE* RCM 922(e).

RCM 1007(c) provides:

> (e) *Polling prohibited.* Except as provided in Mil.R.Evid. 606, members may not otherwise be questioned about their deliberations and voting.

RCM 922(e) contains virtually identical language. Appellant has not framed his due process challenge to the above military procedures in terms of the recent decision of the Supreme Court in *Weiss v. United States, supra.* In any event, the death-penalty verdict at a court-martial must be unanimous. *Loving*, 41 MJ at 296.

LXIV

WHETHER THE CAPITAL SENTENCING PROCEDURE IN THE MILITARY IS UNCONSTITUTIONAL BECAUSE THE MILITARY JUDGE LACKS THE POWER TO ADJUST OR SUSPEND A SENTENCE OF DEATH THAT IS IMPROPERLY IMPOSED.

The above argument is submitted to this Court without further briefing. We rejected this same argument in *Loving*, 41 MJ at 297. Moreover, appellant has not otherwise convinced us that this procedure is unconstitutional under the standard provided in *Weiss v. United States, supra, and Middendorf*, 425 U.S. at 43, 96 S.Ct. 1281.

LXV

WHETHER COURT-MARTIAL PROCEDURES DENIED APPELLANT HIS SIXTH AMENDMENT RIGHT TO JURY TRIAL AND AN IMPARTIAL CROSSSECTION OF THE COMMUNITY.

Appellant's Sixth Amendment attacks on the court-martial system are without merit. *See Loving*, 41 MJ at 285; *United States v. Smith*, 27 MJ 242, 248 (CMA 1988); *SantiagoDavila*, 26 MJ at 389; *see generally Ex parte Quirin*, 317 U.S. 1, 39-41, 63 S.Ct. 2, 87 L.Ed. 3 (1942); *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 15 L.Ed. 838 (1858).

LXVI

WHETHER APPELLANT'S DEATH SENTENCE VIOLATES THE EIGHTH AMENDMENT'S PROHIBITION AGAINST CRUEL AND, UNUSUAL PUNISHMENT.

Appellant has not chosen to otherwise brief this issue. Thus, we assume that he argues that a death sentence *per se* violates the Eighth Amendment as cruel and unusual punishment. Supreme Court case law does not support this argument as a matter of law. *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *see United States v. Matthews*, 16 MJ 354 (CMA 1983).

LXVII

WHETHER THE NUMEROUS ERRORS WHICH OCCURRED DURING APPELLANT'S COURT-MARTIAL CAN BE FOUND HARMLESS BEYOND A REASONABLE DOUBT WHEN CONSIDERED COLLECTIVELY.

Appellant argues that the principle of cumulative error warrants reversal of his death sentence. *See Mak v. Blodgett*, 970 F.2d 614 (9th Cir. 1992), *cert. denied*, 507 U.S. 951, 113 S.Ct. 1363, 122 L.Ed.2d 742 (1993). He argues that

> at a minimum, the following issues warrant reversal in his case: the newly discovered evidence of organic brain damage; the ineffective assistance of his counsel; the denial of expert resources; the incompetent assistance from his mental health experts; the improper granting of challenges during *voir dire;* the use of his civilian plea agreement against him; and the military judge's instructional errors.

Final Brief at 383. We disagree.

The implied premise of the cumulative-error doctrine is the existence of errors, "no one perhaps sufficient to merit reversal, [yet] in combination [they all] necessitate the disapproval of a finding" or sentence. *United States v. Banks*, 36 MJ 150, 170-71 (CMA 1992). Assertions of error without merit are not sufficient to invoke this doctrine. Here, we have found no merit in appellant's assertions of error.

LXVIII

WHETHER THE ARMY COURT'S PROPORTIONALITY REVIEW IN THIS CASE

WAS INSUFFICIENT AS A MATTER OF LAW.

In Curtis, 32 MJ at 270-71, this Court held that a "proportionality review" by a Court of Military Review is required by Article 66(c), UCMJ, 10 USC § 866(c), in death penalty cases. Later, in our second opinion in *Curtis*, 33 MJ at 109, Chief Judge Everett defined the scope of the required review, as follows:

> We recognize that this is the first case decided under the procedural changes promulgated by the President in the Manual for Courts-Martial, United States, 1984, and hence, there will be few, if any, cases in military or federal district courts which would be proper subjects for proportionality comparison. However, the gravamen of the offenses here (i.e., double homicide during a burglary) is not unique to the military, and *it would be fitting for the Court of Military Review to consider generally similar cases reviewed by the Supreme Court of the United States in which state courts have imposed the death penalty for like crimes on that basis. See United States v. Curtis*, 32 MJ at 270, 271. The Court of Military Review should determine whether the sentence here is appropriate for the crimes of which the accused stands convicted and whether the sentence is generally proportional to those imposed by other jurisdictions in similar situations. *See generally McCleskey v. Kemp*, 481 U.S. 279, 306-08, 107 S.Ct. 1756, 1774-76, 95 L.Ed.2d 262 (1987); *Pulley v. Harris*, [465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984)].

(Footnote omitted; emphasis added.)

The Court of Military Review in appellant's case performed a proportionality review, as follows:

> We have examined a number of cases and have concluded that the sentence is generally proportional to those imposed by other jurisdictions in similar situations.[13]

37 MJ at 749. A similar proportionality review was approved by this Court in *Loving*, 41 MJ at 290-91.

Appellant challenges the Court of Military Review's "proportionality review" because it failed to designate appropriate proportionality standards. Counsel refers this Court to a state-court decision in *State v. Marshall*, 130 N.J. 109, 613 A.2d 1059 (N.J. 1992), as a model for such a review and asserts that the Court of Military Review's decision on this issue pales by comparison. Counsel suggests that the following important characteristics be considered in an adequate proportionately review:

> Vulnerability of the victim (i.e.; [sic] child, female, infirmity, frailty); 2) Lack of remorse; 3) Extent of mutilation or torture; 4) Number of victims; 5) Degree of premeditation (planning v. spontaneity); 6) Scene of the crime (victim's home v. public setting); 7) Personal background of the accused; 8) Prior murder by the accused

---

[13] A computer search was used to examine cases reviewed by the Supreme Court since the reinstatement of the death penalty following *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). Among the cases examined were *Boyde v. California*, 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990); *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990); *Clemons v. Mississippi*, 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed. 2d 725 (1990); *Blystone v. Pennsylvania*, 494 U.S. 299, 110 S.Ct. 1078, 108 L.Ed.2d 255 (1990); and *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983).

> at some time in the past; 9) Murder for hire; 10) Cop killer; 11) Killing to escape detection or capture; 12) Felony-murder; 13) Emotional disturbance of accused; 14) Age of accused; 15) Duress on accused at the time of the killing; and 16) Intoxication level of accused at the time of the killing.

Final Brief at 387.

Appellant's initial argument is that proportionality review prescribed by this Court in the *Curtis* decisions is inadequate because it has no standards. He contends that the term generally similar cases" as used in *Curtis* (II), 33 MJ at 109, is unduly vague and creates a "risk of arbitrariness" in the appellate review of death sentences. Final Brief at 390, 391. We disagree. *See Loving, supra* at 290-91.

At the outset we note that the "proportionality review" ordered in the *Curtis* decisions is not constitutionally required. *See McClesky,* 481 U.S. at 306-07, 107 S.Ct. 1756; *cf. Zant,* 462 U.S. at 879, 890, 103 S.Ct. 2733. We, however, have held that this review is required by Article 66(c) in capital cases as part of the "sentence appropriateness" determination by the court below. *Curtis,* 33 MJ at 109; *see generally United States v. Healy,* 26 MJ 394, 395 (CMA 1988). In view of this unique appellate power *(see Ryder v. United States,* 515 U.S. 177, 187, 115 S.Ct. 2031, 2038, 132 L.Ed.2d 136 (1995)), adoption of the proportionality reviews utilized by other state or federal jurisdictions is neither required nor appropriate.

We also disagree with appellant's argument that *Curtis II* provides no standard for the Court of Military Review to conduct its proportionality review. It is true that our decision does not provide the detailed and in-depth review that *Marshall* does.

That review was mandated by a state statute, N.J.S.A. 2C: 11-3e, which then required "the Supreme Court . . . to determine whether the [death] sentence . . . is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant" and was an "offender-oriented proportionality review." 613 A.2d at 1062, 1069; *see State v. DiFrisco*, 142 N.J. 148, 662 A.2d 442, 448-50 (1995). Our system, however, employs a general "offense-oriented proportionality review." (613 A.2d at 1067-68, which also is in effect in New Jersey, *id.* at 1068 ("does the punishment fit the crime?")); *see Tison v. Arizona*, 481 U.S. 137, 158, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987) (reckless-indifference murder); *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) (aider and abettor to felony murder); *Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977) (rape); *see also State v. DeFrisco, supra.*

Finally we do not find the proportionality review of the Court of Military Review in this case to have violated our command in *Curtis II*. That court considered Supreme Court decisions on state cases, which presented situations similar to appellant's. 37 MJ at 749 and n. 13. In these cases, death penalties were imposed in various state jurisdictions for a single murder occurring during or after a robbery or burglary. Appellant's court-martial involved multiple premeditated murders preceded by rapes or forced sodomies. We see no general disproportionality in appellant's sentence or with the sentence in *United States v. Loving*, 41 MJ 213 (1994).

LXIX

WHETHER THE ARMY COURT ERRED IN CONCLUDING THAT THE DEATH SENTENCE WAS AN APPROPRIATE SENTENCE IN THIS CASE.

Appellant challenges the Court of Military Review's decision that "under all of the facts and circumstances of the case the death sentence is appropriate, Art. 66(c). *Curtis*, 32 MJ at 271. 37 MJ at 749. He also notes that the Court of Military Review held "beyond a reasonable doubt that even with the introduction of the organic brain damage the panel would still have imposed the death sentence." Final Brief at 397. Appellant asserts that such determinations are untenable and unsupported by the record of trial.

In exercising its unique-sentencing power under Article 66(c), the Court of Military Review may take into consideration matters not considered by the court members. See *United States v. Healy, supra.* In this regard we note that the Court of Military Review was fully aware of the post-trial materials establishing appellant's organic brain damage. Moreover, it had been informed of the evidence of a personality disorder which had been presented to the members. Finally, they were well aware of appellant's two murders, his aggravated assault on a third woman, and the numerous sexual offenses committed on these victims. In these circumstances, we see no abuse of discretion or other error of law in the Court of Military Review's sentence-appropriateness determination. *See generally United States v. Dukes*, 5 MJ 71 (CMA 1978).

ISSUE LXX

ISSUES PERSONALLY ASSIGNED PURSUANT TO *UNITED STATES V. GROSTEFON*, 12 MJ 431 (CMA 1982).

In footnote 3 to the Final Brief counsel calls the attention of this Court to 31 issues personally assigned by appellant that are contained in Appendix C to that brief. *See* Attachment. We note that *Grostefon* does not permit

an appellant to raise such issues in an untimely manner without good cause. *See Healy*, 26 MJ at 397. No good cause is averred for this untimely pleading in appellant's case. Moreover, all these issues were raised without any general or particular assertion that appellant was prejudiced by these claimed legal errors. *See generally United States v. Pollard*, 38 MJ 41, 51-52 (CMA 1993); *see* Rule 21(b)(4), United States Court of Military Appeals Rules of Practice and Procedure (requiring "[a] direct and concise argument showing why there is good cause to grant the petition, demonstrating with particularity why the errors assigned are materially prejudicial to the substantial rights of the appellant. . . .") 31 MJ 466.

In any event, we have considered these issues *(see United States v. Matias*, 25 MJ 356, 361 (CMA 1987)), and note that five of them [(nos. 1-4, 26 duplicates no. 4)] raised questions of ineffectiveness of counsel which are cumulative of issues previously raised by appellate defense counsel and resolved in our opinion against him. The same applies to no. 14 (Issue XVI), no. 20 (Issue LXV), and no. 22 (Issue XXII). No. 15 is resolved by *Solorio*. The evidentiary-sufficiency questions (nos. 27 and 29) we reject out of hand as unsupported in law. *See Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). The other 20 issues challenged trial decisions by the military judge. We have reviewed the record of trial and find no abuse of discretion or otherwise reversible error by the judge in these rulings (nos. 5-13, 16-19, 21, 21-25, 28, 30, and 31*). See generally Matias, supra* at 361.

The decision of the United States Army Court of Military Review is affirmed.

ATTACHMENT

Pursuant to *United States v. Grostefon*, 12 MJ 431 (CMA 1982), appellant invites the Court's attention to the following, noninclusive list of personally asserted errors:

1. His counsel did not provide him with effective assistance of counsel due to the fact that they failed to inform him whether they met the prevailing professional standards promulgated by the American Bar Association and the National Legal Aid and Defender Association for capital representation. Captain Brewer stated in his post-trial affidavit, (Def. App. Exh. L), that he contacted his state bar association regarding this matter; however, SPC Gray was never informed of it. Had SPC Gray known of this, he would have requested that CPT Brewer be released from his case.

2. Appellant submits that his counsel were ineffective because they failed to fully investigate his mental health history. Specialist Gray had informed his counsel that he had experienced headaches since he was a child, and constantly felt as though there was "bleeding" inside his head. To his knowledge, however, his counsel disregarded this information.

3. Specialist Gray's counsel were ineffective for allowing him to plead guilty to the civilian charges against him. The fact that he had received eight life sentences as a result of his plea created a heavy bias in the panel members against him. This information, in combination with the sparse case in mitigation, severely disadvantaged appellant when the time came to argue that the members should punish him by adding one more term of life to his sentence as opposed to sentencing him to death.

4. Captain Brewer failed to effectively represent appellant when, during his sentencing argument, CPT Brewer referred to appellant as a nut, and said that he was personally in favor of the death penalty.

5. The military judge erred by refusing to grant appellant pretrial confinement credit from January 6, 1987, when he was first apprehended by civilian law enforcement authorities, until the date of his trial.

6. The military judge improperly denied appellant's request for additional peremptory challenges. (R. at 16; App. Exh. III; App. Exh. XI.)

7. The military judge improperly denied the defense motion to sequester the panel members. (R. at 119.)

8. The military judge improperly denied the defense motion to dismiss charges based on speedy trial. (App. Exhs. XXV, XXXa, and XXXVI.)

9. The military judge improperly denied the defense motion for a new pretrial investigation pursuant to UCMJ art. 32. (App. Exh. XXVII.)

10. The military judge improperly denied the defense motion for change of venue. (App. Exhs. XXVIII, XXXVIIIa.)

11. The military judge improperly refused to review a videotape in support of the defense motion for a change of venue. (R. at 141-43; App. Exh. XXX.)

12. The military judge improperly denied the defense motion to sever charges. (R. at 155; App. Exh. XXXV.)

13. The military judge improperly denied appellant's motion to hold unconstitutional Manual for Courts-Martial, United States, 1984, Rule 916(k)(2). *See App.* Exh. XXXIV.

14. The military judge improperly denied the defense request for an independent investigator. (R. at 156-161.)

15. The military judge improperly denied the defense motion to dismiss Charges IV and VI for lack of jurisdiction. (R. at 463; App. Exh. XXXVIII.)

16. The military judge (1) improperly failed to order a new pretrial advice due to improper advisement as to maximum punishment for the offense of rape; and (2) failure to advise the convening authority of mitigating factors. (R. at 172.)

17. The military judge improperly denied appellant's request for production of evidence. (R. at 176.)

18. The military judge improperly denied the defense motion to suppress the black "ninja" pants. (App. Exh. XLIV.)

19. The military judge improperly denied appellant's motion to suppress items seized from appellant's personal effects drawer at the confinement facility, even though the military judge found that appellant had a reasonable expectation of privacy in the items seized. (R. at 346.)

20. The military judge improperly denied appellant's motion for a panel composed of members reflecting a fair cross-section of the community. (R. at 414-419.)

21. The military judge improperly denied the defense objection to handwriting exemplars gathered from appellant. (R. at 419-22; App. Exh. XLIX.)

22. The military judge improperly denied the defense request for the identity of a CID registered agent. (R. at 425.)

23. The military judge improperly denied the defense challenges for cause against Captain Barner and First Sergeant Peden. (R. at 706, 733.)

24. The military judge improperly denied the defense request for a mistrial based on a witness' reference to an

uncharged rape occurring "in November [1986]." (R. at 829.)

25. The military judge improperly denied the defense request for a mistrial based on trial counsel's comment on appellant's silence (i.e., appellant has shown no remorse).

26. The trial defense counsel was ineffective in commenting that he personally was in favor of the death penalty.

27. The evidence is insufficient to support the finding of guilty of attempted premeditated murder (Charge I and its specification) where appellant allegedly said to Private Nameth, "don't scream or me and my buddy will come back and kill you."

28. The military judge improperly denied defense motions to suppress prosecution exhibits throughout the trial.

29. The military judge improperly denied the defense motions for a finding of not guilty of offenses. (R. at 1876-1886, 2059.)

30. The military judge improperly denied the defense request for instructions on lesser-included offenses.

31. The military judge improperly admitted evidence of appellant's civilian convictions in aggravation. (R. at 2240-48.)

EFFRON, Judge, with whom COX, Chief Judge, joins (dissenting):

I

In Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), the Supreme Court held that the discriminatory use of peremptory challenges by the prosecution to remove members of the same cognizable

minority racial group as the defendant from a jury violated the constitutional right to equal protection of the laws. In *United States v. Santiago-Davila*, 26 MJ 380, 389-90 (1988), we applied *Batson* to the exercise of peremptory challenges in courts-martial even if the accused had been tried prior to the Supreme Court's decision in *Batson*.

The majority suggests that *Batson* does not apply to this case or that it does not apply with full force, because appellant was tried before we published our decisions in *Santiago-Davila* and *United States v. Moore*, 28 MJ 366 (1989), in which we applied *Batson* to trials by court-malrtial. The majority's position is contrary to precedent in our Court and in the Supreme Court.

In Santiago-Davila, where we first adopted the *Batson* framework for the military, the accused was tried on July 10, 1985 — 9 months before the Supreme Court's decision in *Batson*. The military judge in that case did not have the benefit of the Supreme Court's decision when he ruled on Santiago-Davila's objection to the Government's peremptory challenge; in fact, the military judge in that case was faced with directly contradictory language in the 1984 Manual for Courts-Martial (RCM 912(g)(1), Discussion), which suggested that the reasons for a peremptory challenge need not be stated. 26 MJ at 386. Furthermore, the defense in *Santiago-Davila* did not rely on federal law but relied solely on decisions of the California Supreme Court and other state and federal courts in its argument at trial. *Id.* at 385.

Nonetheless, even in those circumstances, we held that *Batson* "applied . . . retroactively to trials that preceded its rendition," id. at 390, citing the Supreme Court's decision in *Griffith v. Kentucky*, 479 U.S. 314, 316, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987) *(applying*

Batson retroactively to cases not final at the issuance of *Batson).* We ultimately granted Santiago-Davila a hearing on his *Batson claim, id.* at 392. *See also Moore,* 28 MJ at 367 n.2, 368 (remanding for factfinding hearing where accused was tried after *Batson* but before *Santiago-Davila).*

The present case does not involve a *pre-Batson* trial. Appellant was tried in late 1987 and early-1988 — over one year after *Batson* was decided. The defense expressly cited *Batson* at trial as the basis of its objection. The military judge had the benefit of the Supreme Court's decision in *Batson,* yet declined to apply the Supreme Court's precedent. In view of the relief granted in *Santiago-Davila* — where the military judge did not even have the opportunity to consider the Supreme Court's decision in *Batson* — it is inappropriate to suggest that appellant should be denied the constitutional protections of *Batson* because of concerns about retroactivity.

II

In *Batson,* the Supreme Court established a three-part procedure for addressing objections to the exercise of peremptory challenges. First, the trial judge must determine whether the defense has established "*a prima facie* case of purposeful discrimination." 476 U.S. at 96-97, 106 S.Ct. 1712. Second, if "the requisite showing" is made, "the burden shifts to the" prosecution to "articulate a neutral explanation [for the challenge] related to the particular case to be tried." *Id.* at 96-98, 106 S.Ct. 1712. Finally, the trial judge "will have the *duty* to determine if the defendant has established purposeful discrimination." *Id.* at 98, 106 S.Ct. 1712 (emphasis added); *see United States v. Greene,* 36 MJ 274, 278 n.2 (CMA 1993). In the case before us, the

military judge committed prejudicial error by failing to perform his duty under *Batson*.

III

The peremptory challenge at issue in this case was exercised by the Government to remove an African-American officer, Major Quander, from appellant's court-martial panel. Appellant also is an African-American. At the conclusion of challenges for cause, none of which were directed at Major Quander, the prosecution sought to challenge Major Quander peremptorily. Defense counsel, relying on the fact that appellant and Major Quander were of the same racial minority, objected to the challenge and asked the military judge to require trial counsel to demonstrate that the challenge was being exercised for a reason other than Major Quander's race.[1]

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[1] Because appellant and Major Quander were both African-American, once appellant objected to the Government's peremptory challenge of Major Quander, he met his burden to establish a prima facie case of discrimination under *Batson* as applied in the military justice system. *See Greene*, 36 MJ at 278; Moore, 28 MJ at 368 (per se showing of prima facie case of discrimination when African-American accused objects to prosecution challenge of African-American panel member). The majority notes, 51 MJ 34, that we mandated application of the *per se* rule for cases arising after *Moore*. That approach was designed to ensure that the *per se* rule would not be applied to reverse a case tried before *Moore* in which the military judge-conscientiously applying the first prong of *Batson*—required more of a showing than the fact that the defendant and the challenged member both were African-American. Here, however, the prosecution did not claim that the defense had failed to meet the first prong of *Batson*, nor was that the basis of the military judge's ultimate ruling on the challenge. In fact, the military judge simply declined to address the first prong of Batson. Had he done so, and had he required appellant to demonstrate more than a per se showing, we would have before us appellant's evidence

The military judge refused to require the prosecution to provide a race-neutral explanation for the peremptory challenge, asserting that no explanation was necessary. Subsequently, he asked trial counsel to state on the record that the challenge was not based on appellant's race, and trial counsel did so. When trial counsel offered to "give some sort of articulation as to the reason we feel that we should perempt [sic] him based on—," the military judge cut him off in mid-sentence. The military judge refused to allow any further explanation by trial counsel and granted the peremptory challenge against Major Quander. The military judge did not enter any findings of fact or conclusions of law on the merits of the defense objection to the prosecution's exercise of the peremptory challenge.

After the peremptory challenge was allowed, the military judge recessed the trial for the weekend. When the court-martial reconvened following the weekend recess, trial counsel filed appellate exhibit LVIII, a memorandum for the record, in which the prosecution team stated that "[t]he peremptory challenge against Major Quander was exercised because we believed his responses concerning the death penalty were equivocal."[2]

([1]...Continued)
as well as the findings and conclusions of the military judge as the basis for determining whether to sustain the military judge's ruling. In the absence of a record that demonstrates that the military judge followed the literal requirements of *Batson*, appellant is entitled to rely on his per se showing to meet the first prong of *Batson*. *Cf.*, e.g., *United States v. Cooper*, 28 MJ 810, 814 (ACMR 1989), aff'd 30 MJ 201 (CMA 1990); see *United States v. Ruiz*, 49 MJ 340 (1998).

2 The text of the memorandum is set forth in the Appendix to this opinion.

(Continued...)

IV

In the present case, the military judge erred by granting the peremptory challenge without requiring the Government to provide a race-neutral explanation for the peremptory challenge of Major Quander. This error was compounded by the military judge's reliance on the mere denial by trial counsel of discriminatory intent, his failure to make findings of fact and conclusions of law, and his failure to rule on the credibility of the post-hoc explanation filed by trial counsel as an appellate exhibit.

When the defense objected at trial to the peremptory challenge of Major Quander, the Government responded by stating on the record that the challenge was not based on racial grounds. The Supreme Court has explained, however, that a mere denial of discriminatory intent or an affirmance of good faith does not comply with *Batson's* second step. *Batson*, 476 U.S. at 98, 106 S.Ct. 1712; *see also Purkett v. Elem*, 514 U.S. 765, 769, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995). The Government is obligated to provide a race neutral explanation for its challenge. In the military justice system, "all the reasons proffered by trial counsel [must] be untainted by any inherently discriminatory motives." *Greene*, 36 MJ at 280.

In this case, the military judge made clear that he was not going to enter any findings of fact or conclusions of law on the issue of discrimination. Trial counsel subsequently filed as an appellate exhibit an unsworn statement asserting a race-neutral reason for the peremptory challenge against Major Quander. The mere filing of an appellate exhibit, after the military judge has refused to require compliance with *Batson*, does not remedy the error by the military judge.

The Supreme Court has made clear that the mere articulation of a race-neutral explanation does not satisfy *Batson:* "Once the prosecutor offers a race-neutral basis for his exercise of peremptory challenges, '[t]he trial court then [has] the duty to determine if the defendant has established purposeful discrimination.'" *Hernandez v. New York*, 500 U.S. 352, 363, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991) (quoting *Batson*, 476 U.S. at 98, 106 S.Ct. 1712). The Supreme Court in *Hernandez* emphasized the role of the trial judge in evaluating the sincerity of the Government's explanation for a peremptory challenge, noting:

> In the typical peremptory challenge inquiry, *the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed.* There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge. As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies "peculiarly within a trial judge's province."

Id. at 365, 111 S.Ct. 1859 (emphasis added); *see also Purkett*, 514 U.S. at 768, 115 S.Ct. 1769 (emphasizing that it is the responsibility of the trial judge, at the third step of the *Batson* process, to assess "the persuasiveness" of the proffered "justification"). In *Batson* and its progeny, the Supreme Court has placed on the trial judge the responsibility to evaluate the explanation for a peremptory challenge, and the cases all recognize the critical importance of the judge in uncovering pretextual explanations.

Our Court has made clear that the military judge bears "the ultimate responsibility to determine the

existence of purposeful discrimination on the part of trial counsel." *Greene*, 36 MJ at 281 (citing plurality and O'Connor opinions in *Hernandez)*. In *Greene*, we described the three steps that the military judge must take to fulfill this responsibility, as follows: The military judge must, first, "review the record"; second, "weigh trial counsel's credibility"; and third, make "a factual determination regarding the presence or absence of purposeful discrimination in the panel member's rejection." 36 MJ at 281. We further emphasized the critical importance of the military judge's determination in the *Batson* equation by noting:

> [E]ven if a race-neutral explanation has been proffered by trial counsel for the peremptory challenge, it does not end the military judge's duties under *Batson. The military judge must still determine whether "the asserted justification is merely a pretext for intentional race-based discrimination. See Batson* [476 U.S.] at 93, 106 S.Ct. at 1721."

36 MJ at 281 (citation omitted; emphasis added) (quoting *Hernandez, 500* U.S. at 375, 111 S.Ct. 1859 (O'Connor and Scalia, JJ., concurring in the judgment).

In this case, the military judge failed completely to comply with the critical third step of *Batson* — evaluation of the credibility of the Government's proffered explanation. *Batson* is not satisfied merely by trial counsel's articulation of a race-neutral reason for a peremptory challenge; rather, *Batson* places on the military judge an affirmative duty to assess whether the Government's explanation is credible or merely a pretext.

In *Moore*, we noted that we would "not rule out" the possibility that, in a future case, "a clearly articulated affidavit" might provide post-trial proof of a non-

discriminatory intent. 28 MJ at 368 n.7. Although there may be cases in which the record of trial provides such clear and unambiguous support for trial counsel's post-hoc rationale that it is possible to find the military judge's error to be harmless, this is not such a case. *See generally Bennett v. Collins*, 852 F. Supp. 570, 584-85 (E.D. Tex. 1994) (prosecution's rationale that juror "had not given much thought to the death penalty" treated as "pretextual" by federal habeas judge in ruling prosecution's exercise of peremptory challenge against African-American venirepersons unconstitutional).

The credibility of the prosecution's rationale was clearly at issue in this case. The record of trial reflects thoughtful responses by Major Quander to questions about the death penalty. He made clear that he could do his duty, follow the law as instructed by the military judge, and vote for the death penalty. He stated: "I can definitely consider it. I would honestly have to say I would have some problems saying yes, but I could do it." Such a response is not particularly remarkable from a member facing the awesome responsibility of adjudging the ultimate penalty.

In light of this record, it was critical that the military judge make a determination as to whether trial counsel's explanation was credible or pretextual. If the military judge had done so, we would sustain his "findings on this factual question unless clearly erroneous." *Greene*, 36 MJ at 281 (citing *Hernandez*, 500 U.S. at 369, 111 S.Ct. 1859). In the absence of such a determination, however, we have no indication that the military judge based his allowance of the challenge on a permissible criteria, and there is no trial-level ruling for us to review.

Although it is possible that the military judge allowed the challenge in compliance with *Batson*, *i.e.*, after

determining that the Government's explanation was not pretextual, there are three other equally likely grounds for his decision, all of which would violate *Batson: (1)* the military judge may have complied with the then-existing provisions of the Manual for Courts-Martial, under which no explanation was required for the exercise of a peremptory challenge[3]; (2) the military judge may have found that the Government's rationale was pretextual but believed that a pretextual reason was permissible[4]; or (3) the military judge may not have considered at all the questions of discrimination and pretext and simply allowed the peremptory challenge.

Despite the absence of a definitive ruling by the military judge, the majority claims that the military judge "did more than require trial counsel to simply state whether his 'challenge was a result of his bias or prejudice'" (51 MJ at 34) and that the judge made an "implied ruling" on the question of pretext (51 MJ at 34). These assertions are not supported by the record.

The exchange between defense counsel, trial counsel, and the military judge demonstrates that the judge determined that he was not required to address the *Batson* issue. When trial counsel offered to "give some sort of articulation as to the reason" for the challenge, the military judge simply stated that his blanket denial of racial bias would suffice. When trial counsel proffered his explanation for the challenge at the next session of court, the military judge did not provide any indication that he considered it, but merely allowed trial counsel to submit the statement as an appellate exhibit. There is absolutely no indication that the military judge

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3 *See Santiago-Davila*, 26 MJ at 386.

4 *See Purkett*, 514 U.S. at 768, 115 S.Ct. 1769; *Greene*, 36 MJ at 282 (remanding where the military judge ruled only "on the race-neutrality" of the proffered reason and not on trial counsel's "true motive").

attached any evidentiary value to trial counsel's statement, and the statement did not constitute in any way a ruling on the part of the military judge. In such circumstances, the military judge's "judicial inaction . . . constituted clear legal error." *Greene*, 36 MJ at 282.

In this regard, this case is controlled by *Santiago-Davila*, a case which we remanded because the military judge neither required an explanation from the Government nor ruled on the issue of discrimination, 26 MJ at 386; and by *Moore*, where we remanded for a *DuBay* hearing on the *Batson* issue and instructed the judge to "determine whether trial counsel has articulated a neutral explanation relative to this particular case." 28 MJ at 369. *Accord United States v. Ruiz*, 49 MJ 340 (1998); *see also Purkett*, 514 U.S. at 768, 115 S.Ct. 1769 (responsibility of trial judge to uncover justifications that are merely "pretexts for purposeful discrimination"); *Jones v. Plaster*, 57 F.3d 417, 421 (4th Cir. 1995) (remanding where district court "failed to rule squarely" on whether a peremptory strike was motivated by "race-neutral" purposes; concluded that "on this record, we cannot determine whether the district court applied the proper legal analysis" in overruling the defense's objection to the peremptory challenge); *cf. United States v. Clemons*, 941 F.2d 321, 325 (5th Cir. 1991) (applying clearly-erroneous standard and upholding district court finding that "race-neutral" reasons were not pretextual).

V

To support the evidentiary value that it attaches to the explanation submitted by trial counsel, the majority cites *Turner v. Marshall*, 121 F.3d 1248, 1254 n.2 (9th Cir. 1997), *cert.denied*, ___ U.S. ___, 118 S.Ct. 1178, 140 L.Ed.2d 186 (1998); *Simmons v. Beyer*, 44 F.3d 1160,

1168 (3d Cir.), *cert. denied*, 516 U.S. 905, 116 S.Ct. 271, 133 L.Ed.2d 192 (1995); and *Cochran v. Herring*, 43 F.3d 1404, 1411 n.1 (11th Cir. 1995), *cert. denied*, 516 U.S. 1073, 116 S.Ct. 776, 133 L.Ed.2d 728 (1996). None of these cases addresses the proper evidentiary value to be accorded to a post-hoc explanation for a peremptory challenge or support the proposition that it is appropriate to sustain a trial judge on the basis of an "implied ruling." On the contrary, these cases emphasize the importance of a factual ruling by the trial judge.

Moreover, in each case, the court of appeals found the *Batson* defect sufficiently serious to warrant either a grant of relief or a remand for further proceedings. In *Cochran*, the Eleventh Circuit affirmed the district court's grant of habeas corpus relief on a *Batson* claim; in *Simmons*, the Third Circuit ordered a new trial because the defendant had established *a prima facie* case of discrimination under the first prong of *Batson*, and the reconstructed record was inadequate to review the *Batson* issue; and in *Turner*, the Ninth Circuit reversed as "clearly erroneous" the district court's finding that the peremptory challenge was not racially based.

In support of its assertion that the entirety of the military judge's conduct constitutes an "implied ruling on his part that trial counsel's explanation was genuine and that appellant's *Batson* claim was without merit," 51 MJ at 35, the majority cites *Purkett v. Elem*, 514 U.S. 765, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995); *Clemons*, 941 F.2d at 323-24; *United States v. Tucker*, 836 F.2d 334, 340 (7th Cir. 1988), *cert.denied*, 490 U.S. 1105, 109 S.Ct. 3 154, 104 L.Ed.2d 1018 (1989); and *United States v. Arce*, 997 F.2d 1123, 1127 (5th Cir. 1993).

Purkett bears no relation to the majority's concept that a trial judge can make an "implied ruling" on the

question of pretext in a *Batson* case. On the contrary, the Supreme Court's decision in *Purkett* stressed the importance of a ruling by the trial judge in the *Batson* procedure. 514 U.S. at 768, 115 S.Ct. 1769; *see also* Part IV, *supra*.

In Clemons, the Fifth Circuit affirmed the district court's denial of a *Batson* challenge on the ground that a brief sidebar conference provided a sufficient opportunity for the defense to rebut the prosecution's race-neutral explanation of a peremptory challenge. 941 F.2d at 324. "The district judge . . . made a finding that the race-neutral reasons stated by [the] prosecutors for striking [two black jurors] were sufficient and nonpretextual," *id.* at 322; the Fifth Circuit reviewed the record and concluded that this finding was "not clearly erroneous," *id.* at 325.

In contrast to this case, where the military judge made no factual ruling, the Fifth Circuit was presented with the district court's express ruling on the question of pretext. *Clemons*, as the majority notes, reiterates *Batson's* express delegation of procedural implementation to the trial courts, but the case does not permit an appellate court to rely on an "implied ruling" by the trial judge. To the contrary, the Fifth Circuit emphasized the need for the district court to "evaluate the prosecutor's explanation and determine whether the explanations are pretextual," *id.* at 323, "[b]ecause the issues presented in a *Batson* challenge turn on evaluations of credibility," *id.* at 325.

Similarly, *Tucker* does not address the validity of an "implied ruling" on a *Batson* challenge. On the contrary, the district court in *Tucker* made an express ruling when, "[a]fter considering the government's explanation, the court 'concluded and was satisfied that racial bias was not responsible for the challenge of the

black venirepersons.'" 836 F.2d at 337. The Seventh Circuit affirmed the district court's denial of the *Batson* challenges on the grounds that the particular procedure employed by the District Court (an *ex parte proceeding*, *id.* at 338) was justified under the circumstances. *Id.* at 340. Although *Tucker* supports the well-established proposition discussed by the majority—that a district court has discretion to adopt procedures for litigating *Batson* claims—*Tucker* does not permit a trial judge to eschew any factfinding and decision-making procedures but still be affirmed on the basis of "implied rulings."

Finally, in *Arce*, the Fifth Circuit found waiver where the defense failed to dispute one of the reasons proffered by the Government for a peremptory challenge during a *Batson* proceeding. 997 F.2d at 1126-27. *Arce*, however, has no bearing on the present case. In *Arce*, the prosecutor asserted his reasons for a peremptory challenge during a *Batson* proceeding, and the defense did not object. Here, however, the military judge did not conduct a *Batson* proceeding; he made clear that he would not apply *Batson*. Although the Government filed an appellate exhibit that asserted reasons for its challenge, the matter was never litigated before, or ruled on by, the military judge.

VI

The prosecution's unsworn after-the-fact memorandum in this case is no substitute for the findings and conclusions that should have been made by the military judge who had presided during the *voir dire* of Major Quander, observed the demeanor of trial counsel and Major Quander, and heard the tone of trial counsel's questions and Major Quander's responses. The end result in this case is that trial counsel was, in effect, both the advocate for striking Major Quander and the

judge of the credibility of his own explanation. That is unacceptable under *Batson*, *Greene*, and their progeny.

The potential for error was called to the attention of the military judge, and he had ample opportunity to make the determination required by *Batson*. The military judge, however, expressly declined on the record to apply Supreme Court precedent. That clear error, which prejudiced the constitutional rights of the accused, requires that we follow our precedent in *Santiago-Davila* and return the case

> to the Judge Advocate General of the Army for referral to an officer exercising general court-martial jurisdiction for the purpose of ordering a limited hearing on the reasons for the peremptory challenge by the prosecution. The findings and conclusions of the military judge at this hearing, or notice of the convening authority's determination that such a hearing is impracticable, should be provided by appellee directly to this Court.

26 MJ at 393 (citing *United States v. DuBay*, 17 USCMA 147, 37 CMR 411 (1967)).[5] *See United States v. Ruiz*, *supra*.

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[5] This is the type of procedure used by the federal courts as an appropriate remedy for a trial court's failure to comply with the procedural requirements of Batson. See, e.g., Bryant v. Speckard, 131 F.3d 1076, 1076-77 (2d Cir. 1997) (decision after reconstruction hearing held by state trial court), *cert. denied*, ___ U.S. ___, 118 S.Ct. 2066, 1 41 L.Ed.2d 143 (1998); Turner, 121 F.3d at 1250 (decision after magistrate judge held evidentiary hearing on *Batson* claim); *United States v. Garrison*, 849 F.2d 103, 105 (4th Cir. 1988) (decision after "adversary hearing" before district court on *Batson* issue), *cert. denied*, 488 U.S. 996, 109 S.Ct. 566, 102 L.Ed.2d 591 (1988).

APPENDIX

The memorandum referred to at n.2, *supra*, is an undated document, signed by trial counsel and assistant trial counsel, entitled "MEMORANDUM FOR RECORD. For Appellate Record, *U.S., v. Gray.*" The document contains the following text:

> 1. On Friday 18 March 1988, the government exercised its one peremptory challenge against Major Francis Quander. Major Quander is a black soldier and the exercise of this challenge left the panel with only one black member. We carefully considered all of the notes we had taken along with our independent recollections of the voir dire process. We both agreed that the peremptory challenge should be exercised against Major Quander.
>
> 2. The peremptory challenge against Major Quander was exercised because we believed his responses concerning the death penalty were equivocal. He indicated that he had never really thought about the death penalty and that he was neither for it or against it. When asked if he could vote for the death penalty he indicated that he "thought" he could. He also stated he had "problems" with the death penalty and the evidence would have to be "devastating" before he could vote for it. He said he could vote for the death penalty but could not say if he would vote to impose the death penalty.
>
> 3. Our impression of Major Quander was that he was indecisive and equivocal on the death penalty issue and that it was in the government's interest to challenge him. We did not have a sufficient basis to challenge him for cause so the peremptory challenge was exercised on him. Major Quander's race was of no consequence in the decision making process except

that we considered not making the challenge to avoid any possibility of an appearance of exclusion on a racial basis. Our peremption [sic] of Major Quander was based on our professional judgement [sic] that it was in the prosecution's best interest to remove him.

APPENDIX B

UNITED STATES ARMY COURT OF MILITARY REVIEW

UNITED STATES, Appellee

v

Specialist Four RONALD A. GRAY,

United States Army, Appellant

ACMR 8800807

15 Dec. 1992

Accused was convicted in general court-martial, 82nd Airborne Division, R.C. McRorie, J., of attempted murder, two specifications of premeditated murder, three specifications of rape, larceny, two specifications of robbery, two specifications of forcible sodomy, and burglary. The United States Army Court of Military Review, Naughton, Senior Judge, held that: (1) trial court properly granted challenges for cause against members who opposed death penalty; (2) prosecution's peremptory challenge did not violate Fifth or Eighth Amendments; (3) trial counsel gave sufficient race-neutral explanation for peremptory challenge of black court member; (4) accused's election of forum was knowingly and voluntarily made; (5) photographs of corpses were admissible; (6) accused was not harmed by military judge's failure to instruct that larceny charge was multiplicious for sentencing purposes with burglary charge; (7) even if military judge should have instructed panel that one act could not be considered as two aggravating factors, death sentence was warranted; (8) evidence that accused suffered from organic brain damage was not newly discovered; (9) military judge acted within his discretion in denying request for

funding for independent investigator; (10) there is no constitutional guarantee to competent psychiatrist; (11) accused was not denied effective assistance; (12) accused suffered no actual prejudice from pretrial publicity; and (13) death sentence was proportionate and appropriate.

Affirmed.

For Appellant: Captain Michael J. Berrigan, JAGC (argued), Colonel Robert B. Kirby, JAGC, Lieutenant Colonel Russell S. Estey, JAGC, Major Michael J. Kelleher, JAGC, Major James M. Heaton, JAGC, Captain Jon W. Stentz, JAGC, Captain Keith W. Sickendick, JAGC, Captain Cynthia Wright, JAGC, Captain Jeffrey J. Fleming, JAGC, Captain Michael E. Smith, JAGC, (on brief).

For Appellee: Captain Glenn L. Kirschner, JAGC (argued), Colonel Alfred F. Arquilla, JAGC, Lieutenant Colonel Daniel J. Dell'Orto, JAGC, Major Gary L. Hausken, JAGC, Major Timothy W. Lucas, JAGC, Captain Jonathan F. Potter, JAGC, Captain Randy V. Cargill, Captain Donald W. Hitzeman, JAGC (on brief).

Before
NAUGHTON, GRAVELLE, and JOHNSTON,
Appellate Military Judges

OPINION OF THE COURT AND
ACTION ON PETITION FOR NEW TRIAL

NAUGHTON, Senior Judge:

A general court-martial composed of officer and enlisted members convicted the appellant, at Fort Bragg, North Carolina, contrary to his pleas, of

attempted murder, premeditated murder (two specifications), rape (three specifications), larceny, robbery (two specifications), forcible sodomy (two speci 'fications), and burglary, in violation of Articles 80, 118, 120, 121, 122, 125, and 129, Uniform Code of Military Justice, 10 U.S.C. §§ 880, 918, 920, 921, 922, 925, and 929 (1982) [hereinafter UCMJ], respectively.[1] The appellant was sentenced to be reduced to Private E1, to forfeit all pay and allowances, to be dishonorably discharged, and to be put to death. The convening authority approved the sentence.

The appellant asserts twenty-seven assignments of error and questions the appropriateness of the sentence. Several of the issues raised have been resolved against the appellant by the Court of Military Appeals and will not be discussed in this opinion.[2] *See United States v.*

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[1] Prior to his court-martial, pursuant to a pretrial agreement, the appellant pleaded guilty in the Cumberland County, North Carolina, Superior Court on 2 November 1987, to two counts of second degree murder, two counts of first degree burglary, five counts of first degree rape, five counts of first degree sexual offense, attempted first degree rape, three counts of second degree kidnapping, two counts of robbery with a dangerous weapon, and assault with a deadly weapon with the intent to kill, and inflicting serious injury. The appellant was sentenced to three consecutive life terms and five concurrent life terms. These offenses involved different victims and the state proceeding was wholly separate from the appellant's court-martial.

[2] The appellant contends that Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1004 [hereinafter R.C.M.] is invalid on the grounds that the President exceeded his authority in promulgating R.C.M. 1004; that R.C.M. 1004 deprives the appellant of equal protection; that R.C.M. 1004 fails to protect the appellant against racially motivated imposition of the death penalty; and that the aggravating factor in R.C.M. 1004(c)(7)(1) is too vague. The appellant also contends that his court-martial in a capital case by a panel composed of less than twelve members violated his rights to equal protection and due process.

(continued....)

Curtis, 32 M.J. 252 (C.M.A. *1991*), *cert. denied*, _ U.S. _, 112 S.Ct. 406, 116 L.Ed.2d 354 (1991), *remanded*, 33 M.J. 101 (C.M.A. 1991). We find no error that prejudices the appellant's substantial rights, specifically find the sentence to death appropriate, and affirm the findings of guilty and the sentence.

1. Procedural History

The appellant's trial concluded on 12 April 1988 and the convening authority took action on the appellant's case on 29 July 1988. The record of trial was received in the Defense Appellate Division on 8 August 1988 and the original defense pleading was filed on 15 September 1989. The initial government answer was filed on 20 July 1990. In response to motions from both the appellant (22 December 1989) and the appellee (2 January 1990), on 13 February 1990, this Court ordered an inquiry into the appellant's mental responsibility at the time of the offenses, his mental capacity at the time of his court-martial, and his current mental capacity. *United States v. Gray*, ACMR 8800807 (A.C.M.R. 13 Feb. 1990) (order) (unpub.). A sanity board convened on 29 June 1990, at the U.S. Disciplinary Barracks, Fort

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([2]...Continued)

With respect to the contention concerning the aggravating factor in R.C.M. 1004 (c)(7)(1), this Court held in *United States v. Murphy*, that R.C.M. 1004(c)(7)(1) was a constitutionally valid aggravating circumstance. 30 M.J. 1040, 1058 (A.C.M.R. 1990), *remanded*, *United States v. Murphy*, 36 M.J. 8 (C.M.A. 14 Apr. 92) (order). The Court, however, did state that the sentencing procedure would be constitutional only if the court members were adequately instructed. *Id.* In the case *sub judice*, the judge failed to explain what was intended by R.C.M. 1004(c)(7)(1). In *Murphy*, the Court held the judge's explanation was inadequate, but the error was not fatal to the sentencing process because there were other aggravating factors present which were unaffected by the error. 30 M.J. at 1059. Similarly, the other aggravating factors in the appellant's case render this error harmless.

Leavenworth, Kansas. The board unanimously found that:

> (a) the appellant did not suffered [sic] from a severe mental disease or defect at the time of the offenses for which he has been convicted; (b) the appellant was able to appreciate the nature and quality or wrongfulness of his conduct at the time of the alleged criminal conduct; (c) the appellant has [sic] sufficient mental capacity to understand the nature of the court-martial proceedings and to conduct or cooperate intelligently in his defense at the time of the trial; and, (d) the appellant presently possesses sufficient mental capacity to understand the nature of the pending appellate proceedings and to conduct or cooperate intelligently in his appeal.

On 27 December 1990, the appellant filed a motion requesting that this Court order the U.S. Government to provide funds in the amount of $15,000.00 to hire an expert psychiatrist, a death-penalty-qualified attorney, and an investigator. We interpreted this motion to be a petition for extraordinary relief in the nature of a writ of mandamus, heard oral argument on the "motion" in January 1991, and, on 12 March 1991, denied the request for funding. *United States v. Gray*, 32 M.J. 730 (A.C.M.R. 1991).[3]

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[3] This Court also held that the appellate defense counsel was "qualified" within the meaning of Articles 27 and 70, UCMJ, 10 U.S.C. §§ 827, 870, to represent the appellant on appeal in a capital case. *Gray*, 32 M.J. at 733-36. Moreover, assuming the prevailing standards for death-penalty-qualified defense attorneys established by the 1989 Amerlican Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases were to apply, "the appellant's counsel satisfies those standards as well." *Id.* at 734.

In April 1991, the appellant requested time to properly investigate the case and prepare supplemental pleadings. This motion was denied and oral argument was scheduled for 31 July 1991. On 3 July 1991, the appellant moved to delay the oral argument. The motion was granted. In August 1991, the appellant renewed his request for funding for an expert psychiatrist and an investigator. We denied the motion on 23 August 1991.

On 12 September 1991, the appellant filed a writ appeal petition with the United States Court of Military Appeals for review of the decision of the Army Court of Military Review on the petition for extraordinary relief in the nature of a writ of mandamus to order the government to provide $10,000.00 to be used by appellate defense counsel to retain a mental health expert and a qualified investigator to evaluate appellant and for an emergency stay of the proceedings in this Court. The Court of Military Appeals denied the writ appeal petition and application for emergency stay on 18 October 1991. *United States v. Gray*, 34 M.J. 164 (C.M.A. 1991) (summary disposition).

The appellant then requested the oral argument, set for 30 October 1991, be postponed to allow the appellant time to file a brief on the issue of proportionality and to prepare additional assignment of errors. This Court granted the motion, and in an order dated 24 October 1991, set argument for 13 November 1991.

On 7 November 1991, the appellate defense counsel filed a motion to withdraw from the case because he was not competent to represent the appellant. We denied this motion.[4]

On 16 December 1991, the appellant requested that we order military authorities to perform additional

[4] We found again the defense counsel was qualified and competent to represent the appellant, *United States v. Gray*, ACMR 8800807 (A.C.M.R. 12 Nov. 1991) (order) (unpub.). *See* Appendix A.

medical and neuropsychological tests. This Court issued an order on 31 December 1991, requiring the requested tests be completed by 1 February 1992.[5] On 26 February 1992, the appellant filed a supplementary assignment of errors and brief (in excess of fifty pages) which was answered by the appellee on 27 March 1992. We heard oral argument on 8 April 1992.

II. FACTS

In January 1987, Ms. B notified civilian authorities that she had spotted the male who had raped her in the vicinity of the Fairlane Acres trailer park located near Fort Bragg, North Carolina. Subsequently, the authorities set up a stakeout of the trailer park. On 6 January, the authorities observed the appellant with a dark bundle underneath his arm. When the authorities apprehended the appellant, he no longer had the bundle; however, authorities found a pair of black karate or "ninja" pants close by in a garbage can. A portion of the cloth belt strap was missing from the pants. The appellant denied committing any offenses and invoked his right to counsel.

Later that same evening, Ms. R's roommate became concerned that her roommate might be missing. The roommate told the authorities that Ms. R, a cab driver

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[5] This Court ordered the following tests be performed on the appellant:

(a) A Magnetic Resonance Imaging (MRI) scan of the appellant's brain;
(b) A 20-channel, scalp electrode, sleep deprived EEG;
(c) A SPECT scan of appellant's brain; and
(d) A complete battery of intellectual, neuropsychological, academic, psychological, and personality tests performed by a fully qualified and credentialed neuropsychologist.

See Part XIV of this opinion for a discussion of the results.

for the Terminal Cab Company, had told her she was going to pick up a $2,000.00 special fare named "Ron" at the trailer park to provide transportation for a drug transaction. Ms. R also told her roommate she was picking up the same "Ron" who had hired her as a driver the previous day. The taxi company logs revealed that Ms. R had picked up an individual the previous day at the appellant's address. Early in the morning of 7 January 1987, two Military Policemen (MPs) on routine patrol spotted a taxicab parked off No Name Road, on Fort Bragg, in the treeline. The Terminal Cab Company revealed that a Ms. R had been driving the cab that night. A few hours later the authorities discovered Ms. R's body in the woods not far from her taxi cab. The body was lying face down in a wooded area. The body was nude except for a pair of socks. Ms. R had been gagged with the black cloth belt strap from the appellant's "ninja" pants, and her hands had been tied behind her back. She had received multiple stab wounds. She also suffered bruises on her eyebrow, bruises on her nose, and a laceration on her lip. Swabs taken from her vagina and anus revealed that she had been raped and sodomized. The appellant's fingerprints were found on the interior door handle of Ms. R's taxi, and money in his possession at the time of his arrest was found to have Ms. R's fingerprints on it.

On 17 January 1987, a soldier looking for an injured deer discovered the half-naked, decomposed body of Private (PVT) V-C, who had been missing from Fort Bragg since 15 December. She had been shot four times (while she was alive), in the neck, forehead, chest, and back of the head. Also, she had suffered blunt force trauma to the right cheek, the left side of her face, around her left eye, her left breast, abdomen, and both legs and arms. PVT V-C had been raped and anally

sodomized. On the date she disappeared, her First Sergeant saw her with a man in "cook whites" at the K-Mart on Fort Bragg Boulevard. Her First Sergeant identified the man as the appellant. PVT V-C's car, found a block from her mobile home, appeared to have been driven through the woods. The driver's seat was pushed back farther than needed for PVT V-C to drive. Three fingerprints matching the appellant's were found on the hood of PVT V-C's car. The murder weapon (a .22-caliber pistol) was found approximately sixty feet from PVT V-C's body. The murder weapon had been previously stolen by the appellant. [6]

After the appellant's arrest, photographs of his face appeared in the local newspaper and on television. While recovering in the hospital, a PVT N reported that the appellant looked like the same man who had raped her in her barracks room at Fort Bragg. According to PVT N, she saw the appellant leave a message for another soldier on a note pad on the door immediately across from her barracks room. The message was, "Ronnie was here. I be back." The appellant then asked to use her bathroom. Upon exiting the bathroom, the appellant grabbed her, held a knife to her throat, and asked for her TA-50 field gear. She testified that the appellant tied her hands behind her back with the cord from a curling iron. He then removed her underclothing, raped her, and stabbed her repeatedly in the neck and side. When he left he told her not to scream or he and his buddy would come back and kill her. PVT N suffered a laceration of the trachea and a collapsed or punctured lung.

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[6] On 12 November 1986, the appellant unlawfully entered a mobile home in the Fairlane Acres trailer park and stole several items, including a .22-caliber pistol.

III. GRANTING OF CHALLENGES FOR CAUSE

The government challenged both Master Sergeant (MSG) M and Command Sergeant Major (CSM) W for cause, citing their opposition to the death penalty as justification. The military judge granted both challenges. The appellant contends that the granting of the challenges was improper because both members stated they were willing to follow the instructions of the military judge despite their individual views on the death penalty.

As to MSG M, the appellant asserts that the granting of the challenge was improper because he never indicated that he was "irrevocably committed. . . to vote against the death penalty regardless of the facts and circumstances. . . . *Gray v. Mississippi*, 481 U.S. 648, 657, 107 S.Ct. 2045, 2051, 95 L.Ed.2d 622 (1987) (quoting *Witherspoon v. Illinois*, 391 U.S. 510, 522, n. 21, 88 S.Ct. 1770, 1777, n. 21, 20 L.Ed.2d 776 (1968)). The appellant has applied the incorrect standard. The present standard is whether the member's views would "prevent or substantially impair the performance of his duties as a juror. . . *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S.Ct. 844, 852, 83 L.Ed.2d 841 (1985) (quoting *Adams v. Texas*, 448 U.S. 38, 45, 100 S.Ct. 2521, 2526, 65 L.Ed.2d 581 (1980); *see also Morgan v. Illinois*, ___ U.S. ___, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992); *United States v. Curtis*, 33 M.J. 101, 107 (C.M.A. 1991). In *Wainwright*, the Court recognized that a juror's bias cannot always be proven with unmistakable clarity, therefore the Court held deference must be paid to the trial judge who sees and hears the juror on voir dire. 469 U.S. at 424, 426, 105 S.Ct. at 852, 853. In this case, the military judge's granting of the challenge is sufficiently supported by the record and bears a presumption of correctness. *Id.* at 428-29, 434, 105 S.Ct. at 854, 857.

During voir dire, MSG M stated he was opposed to the death penalty and would be able to vote for it only in very extreme circumstances. The following responses given by MSG M to the trial counsel indicate that it is highly unlikely that MSG M would find a situation deserving of the death penalty:

> TC: Could you be part of the legal machinery—could you be part of a jury here that would impose the death penalty?
>
> MSG M: Well, sir, I'd—I'd have to—you know, I'd really have to do a lot of soul searching to do that. I really can't, at this point, actually say I can, but I mean—I'd do what I felt was necessary, sir.
>
> TC: So,—but you can conceive of circumstances that would make you vote for the death penalty. Is that right?
>
> MSG M: Yes, sir, extreme circumstances, sir.
>
> TC: And that is, given your opposition and your personal belief that the death penalty—or your personal belief that you oppose the death penalty and the fact that a vote in a court-martial is something that's personal, a personal decision that you have to make, could you actually—could you vote for the death penalty under any circumstances?
>
> MSG M: (Pause)
>
> TC: You see what I'm getting to?
>
> MSG M: Yes, sir, I see what you're getting to, sir, but on a very remote under very remote circumstances, sir.

In CSM W's case, the appellant claims that CSM W was willing to set aside his personal beliefs and follow the instructions of the military judge, to include recommending a death sentence. Therefore, the military judge incorrectly granted the challenge for cause. The record shows CSM W's answers were ambiguous at best. He stated more than once that he could not vote for the death penalty:

> TC: Let me just ask you this: how do you feel about the death penalty?
>
> Do you oppose the death penalty?—or do you think it's a good law?
>
> CSM W: The bible says "Thou shalt not kill," sir.
>
> TC: Could you be part of the legal machinery that could bring about the imposition of the death penalty? Now, when I say that I mean, could you be part of a jury that voted to impose the death penalty?
>
> CSM W: I could be within the system, sir, on the jury, but—but being a part of that jury and that decision-making, if that's the question that you're asking me, sir, I don't think I could, sir.
>
> MJ: Could you ever vote for the death penalty? Yes or no?
>
> CSM W: No, sir.

"The Government need only establish the great likelihood that, because of his religious views or moral scruples, the juror would not be able to give meaningful consideration to imposing a death penalty." *Curtis*, 33 M.J. at 107 (C.M.A. 1991). The military judge found that in both cases the prosecution satisfactorily established the above, and we agree.

IV. PEREMPTORY CHALLENGE PROCEDURE IN COURTS-MARTIAL

The appellant contends that the peremptory challenge procedure in the military justice system, which allows the government to remove any one court member without cause, constitutes an unconstitutional violation of the Fifth and Eighth Amendments in capital cases, in which the prosecutor is free to remove a member whose moral bias against the death penalty does not justify a challenge for cause. We do not agree.

Concurring with an order denying a petition for certiorari, Justice O'Connor stated that permitting prosecutors to take into account the concerns expressed about capital punishment by prospective jurors, or any other factor in exercising peremptory challenges simply does not implicate the concerns expressed in *Witherspoon [supra].*" *Brown v. North Carolina*, 479 U.S. 940, 941, 107 S.Ct. 423, 424, 93 L.Ed.2d 373 (1986), *denying cert. to*, 345 S.E.2d 393 (N.C. 1986). The purpose served by the peremptory challenge is freedom from any bias against the accused but also from prejudice against the prosecution. *Swain v. State of Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965); *see United States v. Loving*, 34 M.J. 956, 968 n. 15 (A.C.M.R. 1992) (recognition that *Swain* is limited by *Batson v.. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986)). Here, the prosecution's peremptory challenge did not violate the Constitution.

V. GOVERNMENT PEREMPTORY C14ALLENGE

The appellant next contends that the military judge failed to comply with *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), and *United States v. Moore*, 28 M.J. 366 (C.M.A. 1989), *rev'd on other*

grounds, 30 M.J. 162 (C.M.A. 1990) (summary disposition), when he refused to have the trial counsel articulate on the record a race-neutral explanation for the govemment's peremptory challenge of one of the two black court members.

When the government used its peremptory challenge to remove one of the two black court members, the defense counsel demanded an explanation on the record. Although the trial counsel offered to articulate the reason for the challenge, the military judge stated one was not necessary. We agree with the appellant that the trial counsel must articulate a race-neutral explanation for a peremptory challenge if objected to by the defense. *Batson*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); *Moore*, 28 M.J. 366. (C.M.A. 1989) (per se rule adopted; when the accused is a member of a recognized racial group and the government uses a peremptory challenge on a member of that racial group and the accused objects, the government is required to provide an explanation). The trial counsel did, however, provide a statement at the next court session, stating a race-neutral explanation for the challenge, to wit, the member's responses concerning the death penalty were equivocal. This statement was included in the record as Appellate Exhibit LVIII. A statement included in the record is sufficient as long as it provides the court with a complete explanation for the challenge. *Moore*, 28 M.J. at 366, 368 n. 6-7. The trial counsel's statement provides a sufficiently race-neutral explanation for the challenge, and we find that public confidence in the military justice system has not been undermined. We therefore find the appellant's assertion to be without merit.

VI. FORUM SELECTION

The appellant asserts that the military judge failed to determine properly, and the evidence of record fails

to show conclusively, the appellant's election as to forum was knowingly and intelligently made. This assertion has no merit.

The appellant was advised of his forum rights twice. When the military judge asked if he had any questions regarding forum, the appellant answered in the negative. The appellant verbally stated he elected enlisted panel members, and he signed a form so indicating *(see* Appellate Exhibit XXIV).

VII. ADMISSIBILITY OF PHOTOGRAPHS

The appellant contends that the military judge erred to the substantial prejudice of the appellant in a capital case by the admission in evidence of gruesome photographs of the corpses, including Prosecution Exhibit 214 which is a photograph of a victim's badly decayed face, with a gunshot wound to the eye socket. This contention has no merit.

At trial, the only photographs objected to by the defense counsel on the basis that they were too gruesome were Prosecution Exhibits 213, 214, and 215. With regard to the other photographs, although the defense counsel requested black and white copies be substituted for the color photographs, he did not state they should be excluded because they were too gruesome. After an Article 39(a) session in which the expert testified about how he would use the photographs, the military judge admitted all the photographs except Prosecution Exhibit 215. The military judge stated that Prosecution Exhibit 215 was too gruesome and was cumulative with Prosecution Exhibit 214. The expert testified Prosecution Exhibit 214 showed the characteristics of the wounds.

Photographs, although gruesome, are admissible if used to prove time of death, identity of the victim, or

exact nature of wounds. *United States v. Murphy*, 30 M.J. 1040 (A.C.M.R. 1990); *United States v. Whitehead*, 30 M.J. 1066 (A.C.M.R. 1990). It is not a matter of whether the photographs were inflammatory but whether they served a legitimate purpose. *Whitehead*, 30 M.J. at 1070, quoting *United States v. Bartholomew*, 3 C.M.R. 41, 48 (C.M.A. 1952). In *United States v. Redmond*, 21 M.J. 319 (C.M.A. 1986), *cert. denied*, 476 U.S. 1105, 106 S.Ct. 1950, 90 L.Ed.2d 359 (1986), the court held that the military judge's decision to admit a skull would not be overturned absent a clear abuse of discretion. Further, the Court did not believe that experienced officers on the panel would have been significantly influenced by the admission of the skull.

In the case *sub judice*, the photographs' probative value outweighed any prejudicial effect, and they were admissible on the merits. We find the military judge did not abuse his discretion in admitting these photographs. Furthermore, the photographs were not mentioned during sentencing. In that regard, we also find that these photographs were not unduly inflammatory on sentencing and did not cause the court members to impose the death penalty in violation of the Eighth Amendment of the Constitution.

VIII. VICTIM IMPACT ARGUMENT

The appellant contends that the military judge erred to the substantial prejudice of the appellant by allowing the prosecution, during the sentencing portion of a capital case, to engage in improper argument that emphasized victim impact statements in violation of *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987).

A recent Supreme Court decision, however, has overruled the *Booth* case as well as *South Carolina v.*

Gathers, 490 U.S. 805, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989), which the defense also relies upon. *Payne v. Tennessee*, _ U.S. _, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). The Court said the Eighth Amendment did not erect a per se bar prohibiting a capital sentencing jury from considering victim impact evidence relating to the victims's personal characteristics and the emotional impact of the murder on the victim's family, or precluding a prosecutor from arguing such at a sentence hearing. Also, in the appellant's case, the trial defense counsel made no objection at trial; and therefore, the error was waived. Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1001(g) [hereinafter R.C.M.].

IX. TENURE FOR MILITARY JUDGES

The appellant contends that due process requires that trial and intermediate appellate judges in a peacetime military death penalty case have the protection of a fixed term of office. We do not agree.

In *Palmore v. United States*, 411 U.S. 389, 404, 93 S.Ct. 1670, 1679, 36 L.Ed.2d 342 (1973), the Supreme Court stated:

> Under its Article I powers to legislate for the District of Columbia, Congress could provide for trying local criminal cases before courts with judges who did not have Article III tenure and salary protection, there being no constitutional requirement that an Article III judge must preside over every proceeding, including criminal proceedings, in which charge, claim, or defense was based on an Act of Congress or a law made under its authority.

Congress has also created a military judicial system to try cases of criminal misconduct committed by mem-

bers of the Armed Forces, *i.e.*, courts-martial established under Article I of the Constitution, not by federal courts established under Article III. *Id.* The Court further noted, " [T]he Constitution does not provide for life tenure for those performing judicial functions in military trials." *Id., quoting United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17, 76 S.Ct. 1, 5, 100 L.Ed. 8 (1955). The Court of Military Appeals in a recent decision unanimously held that fixed terms of office for the trial and intermediate appellate judges are not required under the due process clause of the Constitution. *United States v. Graf*, 35 M.J. 450 (C.M.A. 1992). *See also United States v. Loving*, 34 M.J. 956, 969 (A.C.M.R. 1992) ("[a]lthough the establishment of a fixed term of office for those performing military judicial functions may be desirable, it is not a Constitutional requirement, but it is a policy matter to be determined by the President, Congress, or each military service.").

X. GOVERNMENT'S USE OF APPELLANT'S STATEMENTS MADE PURSUANT TO A GUILTY PLEA AGREEMENT IN A CIVILIAN TRIAL.

In three related assignments of error, the appellant contends: (1) that the military judge erred to the substantial prejudice of the appellant by allowing the government to use the appellant's statements (Prosecution Exhibits for Identification 19-21) made pursuant to a guilty plea in Cumberland County, North Carolina, where (a) civilian authorities thought it unnecessary to advise the appellant of his *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), rights, (b) the parties did not contemplate use of the statement unless the appellant pleaded guilty at the civilian trial, (c) the military defense counsel were not present when the statement was rendered, and (d) the civilian defense counsel should have known that military

authorities had preferred charges against the appellant, with a view towards the death penalty; (2) the military judge erred by allowing the government to make use of the appellant's statements in violation of a civilian plea agreement; and (3) the civilian defense counsel were ineffective in failing to limit the appellant's statements made pursuant to a civilian plea agreement, or alternatively, in failing to draft terms limiting the use of such statements to the civilian trial. These contentions have no merit.

First, the plea agreement and the appellant's statements were neither offered as evidence nor admitted at the military courts martial.[7] Second, the plea agreement with the state is not rendered involuntary or violated just because the appellant was uninformed about the possibility of a subsequent military prosecution. *See United States v. Jordan*, 870 F.2d 1310 (7th Cir. 1989), *cert. denied*, 493 U.S. 83 1, 110 S.Ct. 101, 107 L.Ed.2d 65 (1989). Thus, there is no error in allowing such an agreement to be used in a subsequent federal or military trial. *Id.; see also United States v. Sandate*, 630 F.2d 326 (5th Cir. 1980), *cert. denied*, 450 U.S. 922, 101 S.Ct. 1372, 67 L.Ed.2d 351 (1981). Third, the attorney's failure to advise his client that there was a possibility of federal (or military) prosecution is not ineffective assistance of counsel. *See United States v. Jordan*, 870 F.2d at 1318. To prove such ineffectiveness, the appellant must offer proof that his attorney did not inform him of such possibilities and that he would not have pleaded guilty but for the incompetence. *Id.* In any event, as the statements were never admitted and were never

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[7] *But see United States v. Howze*, 668 F.2d 322, 324 n.3 (7th Cir. 1982) (the use of a valid guilty plea at a collateral proceeding to prove an element of the crime charged may create a constitutional problem).

brought to the attention of the court members, their mere existence could not have contributed to the findings and sentence in the appellant's court-martial.

XI. MULTIPLICITY

The appellant contends that the military judge failed to instruct the panel members that the Specification of Charge IV (larceny) was multiplicious for sentencing purposes with the Specification of Charge VII (burglary). We find that the military judge did not err.

One of the elements of burglary is that it is done with the intent to commit an offense. Manual for Courts-Martial, United States, 1984, para. 55c(7) [hereinafter MCM, 1984] provides that if the evidence warrants, the intended offense can be charged separately from the offense of burglary. Additionally, such offenses are also separately punishable. *See United States v. Ruiz*, 30 M.J. 867 (N.M.C.M.R. 1990); *United States v. Beaver*, 26 M.J. 991 (A.F.C.M.R. 1988).

Under the circumstances of this case, even if the multiplicity claim was meritorious, there is no harm since the appellant was sentenced to death for the murders and this Court concludes the panel would not have reduced the sentence if they had been instructed that the two specifications were multiplicious.

XII. INSTRUCTIONS ON AGGRAVATION FACTORS

The appellant asserts that the military judge erred by failing to instruct the panel that a single act cannot be considered as two aggravating factors when weighing aggravating factors against any mitigating factors. Citing *People v. Harris*, 36 Cal.3d 36, 201 Cal.Rptr. 782, 679 P.2d 433 (Cal. 1984), *cert. denied*,

469 U.S. 965, 105 S.Ct. 365, 83 L.Ed.2d 301 (1984), the appellant lists aggravating factors which have been found to be duplicitous in the consideration of the death penalty: murder in commission of robbery with a murder for pecuniary gain; commission of a capital felony during a robbery with a capital felony for pecuniary gain. In addition, relying on *United States v. Curtis*, 33 M.J. at 108, the appellant asserts that a double murder should count as only one aggravating factor, not as two.

It is clear from the sentencing worksheet (Appellate Exhibit CII) that the panel found the government had proven the existence of five aggravating factors.[8] Contrary to the appellant's assertion, each aggravating factor was properly considered as none of the five can be considered duplicitous with the other.

Even if we agreed that the military judge erred by failing to instruct the panel that one act cannot be considered as two aggravating factors, this Court can affirm the sentence to death if we determine the sentence would have been the same had the instruction been given. *See Stringer v. Black*, U.S. 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992). In addition, the appellate court can conduct an independent review of the record, reweigh the mitigating and aggravating factors and con-

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[8] The five aggravating factors found were (1) the premeditated murder of PVT V-C was committed while the accused was engaged in the commission of a rape or sodomy; (2) the premeditated murder of PVT V-C was preceded by the intentional infliction of substantial mental and physical pain and suffering of the victim; (3) the premeditated murder of Ms. R was committed while the accused was engaged in the commission of a rape or sodomy; (4) the premeditated murder of Ms. R was preceded by the intentional infliction of substantial mental and physical pain and suffering of the victim; and (5) the accused has been convicted in the same case of more than one violation of Article 118, UCMJ.

clude that the death penalty is warranted. *See Clemons v. Mississippi*, 494, U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990); *see also UnitedStates v. Curtis*, 33 M.J. 101, 108 (C.M.A. 1991) (the potential double counting of aggravating factors should be considered by the Navy-Marine Corps Court of Military Review to determine whether the double counting had any effect on the sentence to death).

We find that none of the five aggravating factors were duplicitous. We have conducted an independent review of the record and reweighed the aggravating factors and the mitigating evidence. We find that the death sentence is warranted. Therefore, the appellant's assertion of error is without merit.

XIII. PAGE LIMIT ON BRIEFS

The appellant contends that this Court's refusal to waive the fifty-page limit on assignments of error and briefs set forth in this court's internal operating procedure constitutes a violation of the appellant's right to due process as established by Article 66(c), UCMJ, 10 U.S.C. § 866(c). The appellant further contends the page limitation violates the appellant's right to the effective assistance of counsel on this first appeal as of right by preventing detailed counsel from fully presenting the appellant's appeal for the review mandated by Congress. We disagree.

Although the former senior judge of this panel refused to grant a waiver of the fifty-page limit on assignments of error and briefs, this Court, as currently composed, has considered all of the filings by appellate defense counsel, including supplementary assignments of error and the excessively lengthy brief they initially sought to file. To date the total defense filings exceed several hundred pages.

XIV. PETITION FOR NEW TRIAL

The appellant contends that in light of new evidence establishing he is suffering from organic brain damage which affects his mental state now, and which affected his mental state at the time of the offenses, a new trial should be granted. In his petition the appellant relies heavily on an affidavit by Dr. Jonathan Pincus, a physician specializing in neurology. After reviewing the results of the tests and evaluations of the appellant, Dr. Pincus concluded that the appellant suffers from organic brain defects that probably impaired his capacity to distinguish right from wrong and conform his conduct to the law. Dr. Pincus did not personally examine the appellant, nor did he review the testimony of the experts. His diagnosis is based only upon his review of all the previous sanity evaluations and the neurological test results.

To warrant a new trial based on newly discovered evidence an appellant must show that:

> (A) The evidence was discovered after the trial;
>
> (B) The evidence is not such that it would have been discovered by the petitioner at the time of trial in the exercise of due diligence; and
>
> (C) The newly discovered evidence, if considered by a court-martial in the light of all other pertinent evidence, would probably produce a substantially more favorable result for the accused.

R.C.M. 1210(f)(2).

Prior to his court-martial, two psychiatrists and a psychologist individually examined the appellant. Based on their evaluations, including a statement that the appellant exhibited symptoms associated with

organic involvement, the defense did not raise a sanity issue on the merits of the trial. Since his court-martial, the appellant has been the subject of two sanity boards and extensive neurological testing, which the appellant contends contains the new evidence warranting a new trial. The evidence of organic brain damage is not newly discovered: according to the appellant's own brief there were "clear indicators of appellant's organic brain damage . . . present at the time of trial. . . ."

Even if we were to agree the evidence qualified as newly discovered evidence in deciding this particular issue, this Court need not and will not decide whether the appellant is or was mentally *responsible. United States v. Triplett*, 45 C.M.R. 271 (C.M.A. 1972). What we must decide is whether there is evidence that warrants a rehearing to determine whether the appellant is mentally responsible. *United States v. Lilly*, 25 M.J. 403 (C.M.A. 1988). The test is whether "the appellate court [is] convinced beyond a reasonable doubt that a different result would not obtain if the trier of fact had this new evidence before it." *United States v. Dock*, 28 M.J. 117, 120 (C.M.A. 1989). *See United States v. Cosner*, 35 M.J. 278 (C.M.A. 1992). The mere existence of conflicting psychiatric opinions does not necessarily require a rehearing. *Dock, at* 119. *See also Triplett*, 45 C.M.R. at 277.

The most recent sanity board (June 1990) concluded that the appellant's mental infirmities were not so severe as to render him not mentally responsible. Additionally, although the members found undifferentiated brain damage, the board reported that it does not appear of sufficient magnitude to negate criminal responsibility. In the words of the board, in order to warrant a finding of a severe mental defect, there would have to be a severe organic disorder, which

there is not. The neuropsychological evaluation, ordered by this Court on 31 December 1991 and administered by Dr. Fred Brown, a clinical neuropsychologist, does refer to evidence of organic brain damage. Nevertheless, although Dr. Brown states he did find evidence of symptoms of an undetermined organic brain syndrome, he did not find evidence of a psychological or personality disorder resulting from the organic brain syndrome such that it would meet criteria of an organic mood (thought anxiety).

More specifically, in an affidavit dated 23 March 1992 obtained by the appellee, Dr. Brown stated that despite appellant's mild organic brain damage the appellant is now, and Dr. Brown believes was at the time of the offenses, able fully to appreciate the nature and quality of his acts and the wrongfulness of his acts.

It is clear that the newly discovered evidence cited by appellate defense counsel is not of a caliber to produce a more favorable verdict. *Dock*, 28 M.J. 117 (C.M.A. 1991); *see also Lilly*, 25 M.J. 403 (C.M.A. 1988).

The appellant also asserts that, should this Court deny his petition for a new trial, at the very least a sentence rehearing should be authorized. We disagree. Even if this Court found that the evidence of organic damage should have been introduced as a mitigating factor, a sentence rehearing is not required. This Court need not use a more generous approach to deciding a petition for a sentencing rehearing than we used here to resolve the appellant's petition for a new trial. *Cosner*, 35 M.J. at 282. As long as the possible mitigating evidence does not implicate the validity of the aggravating factors found by the panel, we are convinced beyond a reasonable doubt that the panel would still have imposed the death sentence. *See Sawyer v. Whitley*, 945 F.2d 812 (5th Cir. 1991), *cert. granted*, ___ U.S. ___, 112 S.Ct. 434, 116 L.Ed.2d 453

(1991), judgment affirmed, __ U.S. __, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992). Finally, we have "no doubt whether the trial sentencer would have adjudged a more lenient sentence." *Cosner,* 35 M.J. at 282.

XV. MISINFORMATION CONCERNING THE APPELLANT'S MENTAL HEALTH

The appellant contends that he was convicted and sentenced to death in violation of the Fifth, Sixth, and Eighth Amendments of the United States Constitution because the sentence and convictions are founded, at least in part, upon misinformation concerning his mental health. This contention is without merit.

The appellant's assertion that his conviction and sentence were based on misinformation and inaccuracies is incorrect. It is true that the appellant now possesses information that was not presented at trial, but the information presented at trial has not been proven incorrect. To gain sentence relief the appellant must show that constitutional error infected the sentencing process to such a degree that it is more probable than not that, but for the constitutional error, the sentence of death would not have been imposed. *Smith v. Murray,* 477 U.S. 527, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986). In *Sawyer v. Whitley,* the appellant unearthed additional evidence of organic brain damage and mental disorders. 945 F.2d 812. The court held this evidence did not implicate the validity of the aggravating circumstances so a rational trier of fact could still have sentenced him to death. *Id.* In the appellant's case, we hold that he has failed to show by clear and convincing evidence that, but for constitutional error at his sentencing proceedings, no reasonable court members would have imposed the death penalty under the Uniform Code of Military Justice.

XVI. FUNDS FOR AN INDEPENDENT INVESTIGATOR

The appellant alleges the military judge denied him due process of law by refusing to grant him the funds to hire an independent investigator. It is clear that an accused is entitled to investigative assistance. *See United States v. Garries*, 22 M.J. 288 (C.M.A. 1986), *cert. denied*, 479 U.S. 985, 107 S.Ct. 575, 93 L.Ed.2d 578 (1986); *United States v. Mustafa*, 22 M.J. 165 (C.M.A. 1986), *cert. denied*, 479 U.S. 953, 107 S.Ct. 444, 93 L.Ed.2d 392 (1986). In the majority of cases, the investigative services available in the military are sufficient. *Garries*, 22 M.J. at 291. Our appellate review of whether or not funds should have been granted involves an assessment of the reasonableness of the military judge's ruling at the time it was made. We must look at the sufficiency of the accused's explanation, determine if he showed the requisite need and justification, and decide whether the assistance provided was adequate. *See United States v. Mann*, 30 M.J. 639 (N.M.C.M.R. 1990), *review denied*, 32 M.J. 45 (C.M.A. 1990).

The defense team requested assistance early in the proceedings. In response, a Criminal Investigation Command [hereinafter CID] agent was appointed specifically to assist the defense in its investigation. In response to the defense's request, the CID agent's actions included locating and interviewing the appellant's natural father, obtaining blood and saliva samples from two possible suspects, and questioning the Terminal Cab Company drivers. After carefully reviewing the specific requests made by the defense and the information provided in response by the CID agent, we conclude that the assistance provided was adequate and that the military judge acted within his discretion in denying the request for funding for an independent investigator.

XVII. RIGHT TO COMPETENT PSYCHIATRIC ASSISTANCE

The appellant asserts that the inadequate evaluation, preparation, and presentation of his case by the psychiatrists at trial violated his constitutional right to competent psychiatric assistance. His claim is principally based on perceived violations of what he claims is the "national standard of care in psychiatry" as set forth by an "eminent" psychiatrist and neurologist he consulted. Cited as examples of the psychiatrists' incompetence[9] is their failure to obtain a medical or social history of the appellant and their failure to rule out organic brain damage before diagnosing personality disorder.

Here the issue is different from the typical case in which the appellant raises the question of whether or not he was provided psychiatric assistance. *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985). In this case, instead of a claim that the appellant was denied access to psychiatric assistance, the appellant alleges the assistance was incompetent and therefore unconstitutional.

There are several problems with the appellant's allegation. First is his definition of what constitutes a competent psychiatrist. He assumes we will accept as correct and binding a definition of the national standard as set forth by a psychiatrist of his selection. A federal court has defined a competent psychiatrist as one who has been licensed or certified to practice. *Clisby v. Jones*, 907 F.2d 1047 (11th Cir. 1989), *rehearing granted, opinion vacated*, 920 F.2d 720 (11th Cir. 1990), *on rehearing*, 960 F.2d 925 (11th Cir. 1992).

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9 The appellant is referring to Dr. Rose and Dr. Armitage, the psychiatrists who examined appellantprior to trial.

Secondly, even if we were to accept a standard similar to the one proposed by the appellant, we disagree that *Ake* requires the appellant to have a psychiatrist who performs up to those standards. In *Clisby*, the court held that, although it is reasonable to require the state to provide a properly qualified psychiatrist, it is not acceptable to burden the state with legal responsibility for the effors of a properly qualified psychiatrist. One must be sure to distinguish the constitutional right to a competent attorney from the right in *Ake* to competent psychiatric assistance. There is no constitutional guarantee to a competent psychiatrist. Even if there were such a guarantee, we find no merit to the appellant's contention. The psychiatrists who examined the appellant were licensed and certified. Neither the appellant nor the appellee objected to the psychiatrists' qualifications, nor did they question their competency at trial.

Thirdly, the appellant's alleged factual basis for his charge that the trial psychiatrists were incompetent is meritless. The appellant alleges that the results of the post-trial tests are so significantly different, as to prove that the trial psychiatrists were incompetent. This is untrue. The sanity boards and the most recent tests all conclude the same thing: the appellant was not and is not suffering from a mental disease or defect. In fact, the conclusions of all the different tests and boards do not vary significantly. Thus, the appellant's claim lacks any factual basis.

Despite the appellant's arguments, it is doubtful whether this Court should get involved in reviewing the competency of psychiatrists. As the Supreme Court stated in *Ake*, "Psychiatry is not . . . an exact science, and psychiatrists disagree widely and frequently . . . on the appropriate diagnosis. . . ." 470 U.S. at 81, 105 S.Ct. at

1095. In two recent federal decisions, allegations of violations of due process because defendants' psychiatrists were incompetent were rejected. *See Harris v. Vasquez*, 949 F.2d 1497 (9th Cir. 1990), *cert. denied*, ___ U.S. ___,112 S.Ct. 1275, 117 L.Ed.2d 501 (1992) (the courts cannot conduct a psychiatric medical malpractice review to determine whether the appellant's psychiatrist was competent); *Silagy v. Peters*, 905 F.2d 986 (7th Cir. 1990), *cert. denied*, 498 U.S. 1110, 111 S.Ct. 1024, 112 L.Ed.2d 1106 (1991) (the courts cannot get into a situation of reviewing a psychiatrist's performance, we do not want a situation of expert psychiatrists being appointed for the sole purpose of discrediting a prior psychiatrist's diagnosis). We refuse to enter into a situation where we are determining the competency of a psychiatrist. The allegation is without merit.

XVIII. SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

The appellant alleges the outcome of his trial is unreliable because his trial defense counsel was ineffective. He cites four errors which he asserts are individually grounds for a finding of ineffectiveness of counsel. To sustain an ineffectiveness of counsel claim, the court must find that the counsel was incompetentandthattheappellantsufferedprejudicebecauseoftheincompetency. *United Statesv. Scott*, 24 M.J. 186 (C.M.A. 1987). To determine the validity of an ineffective assistance of counsel claim, we must answer three questions: (1) Are the allegations made by the appellant true; and if they are, is there a reasonable explanation for the defense counsel's actions; (2) If they are true, did the level of advocacy fall below the level of performance ordinarily expected of counsel; *United States v. DiCupe*, *21* M.J. 440, 442 (C.M.A. 1986), *cert. denied*, 479 U.S. 826, 107 S.Ct. 101, 93 L.Ed.2d 52 (1986); and (3) "[W]hether

there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Scott*, 24 M.J. at 189, *quoting Strickland v. Washington*, 466 U.S. 668, 695, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984); *United States v. Polk*, 32 M.J. 150 (C.M.A. 199 1), *citing United States v. McGillis*, 27 M.J. 462 (C.M.A. 1988) (memorandum opinion and order).

The appellant first asserts that his trial defense counsel was ineffective because he failed to adequately investigate the mitigating circumstances of the appellant's traumatic family background. He cites the evidence recently obtained by his appellate defense counsel in the form of affidavits from the appellant's mother, father, sister, uncle, and aunt as proof of the ineffectiveness. In particular, the appellant cites evidence of head injuries suffered by him as a child from falls and beatings which may have caused organic brain damage. Further, he cites his turbulent family history, to include beatings by his alcoholic stepfather and severe emotional distress from growing up in such a stressful environment.

We do not dispute that a defense counsel "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Scott*, 24 M.J. at 188, *quoting Strickland v. Washington*, 466 U.S. 668, 691, 104 S.Ct. 2052, 2066, 80 L.Ed.2d 674 (1984); *United States v. Polk*, 32 M.J. 150 (C.M.A. 1991). A counsel's performance may be found to be ineffective if he performs little or no investigation. *Chambers v. Armontrout*, 907 F.2d 825, 829 (8th Cir. 1990) (en banc), *cert. denied*, 498 U.S. 950, 1 11 S.Ct. 369, 112 L.Ed.2d 331 (1990).

The defense counsel in this case conducted a reasonable background investigation. The appellant's mother,

sister, and uncle all testified at the sentencing portion of the appellant's trial. They testified to the abuse the appellant suffered as a child at the hands of his stepfather and generally about the conditions under which he grew up. At the defense counsel's request, the appellant's natural father was interviewed by CID. In addition, Dr. Armitage, a forensic psychiatrist who conducted a sanity board on the appellant, testified about the appellant's social background of growing up in the projects, his alcohol dependence, and his abusive stepfather. Considering all this evidence, we hold the defense counsel's performance did not fall below that ordinarily expected of an attorney, as he conducted an adequate investigation.

In a similar claim of ineffectiveness the appellant asserts that his trial defense counsel presented an inadequate case during sentencing. The appellant claims that the ineffectiveness of his defense counsel prevented his strong mitigating evidence from being presented. This allegation is not true. As stated above, substantial mental health evidence was introduced during sentencing. Three mental health experts (two forensic psychiatrists and a psychologist) testified on behalf of the appellant during sentencing. In addition, evidence of the appellant's upbringing and family life was brought out by testimony from his mother, sister, and uncle.

The appellant also claims that his trial defense counsel's failure to challenge the professional competence of the pretrial evaluations of the appellant by the two forensic psychiatrists was ineffective assistance of counsel, as was his failure to ensure the experts did a complete and competent mental health evaluation of appellant. According to the appellant, his defense counsel had the ultimate responsibility to ensure the experts'evaluations were conducted in a professionally

adequate manner. He cites as ineffective assistance the defense counsel's failure to undertake any investigation of the professional competence of the pretrial psychiatric evaluations. He faults counsel for relying upon the appointed psychiatrists to conduct professionally competent evaluations, stating this reliance was unseasoned and unreasonable.

As stated in a previous assignment of error *(see* Part XVII), the appellant's belief that the psychiatrists were incompetent rests on the fact that they did not diagnose him as suffering from organic brain damage and therefore not mentally responsible. The only evidence submitted by the appellant to prove the experts who examined him were incompetent consists of the opinions from two other experts, one a neurologist, the other a psychiatrist-neurologist.

The experts that examined the appellant prior to trial, the two forensic psychiatrists and a psychologist, were all properly credentialed in their respective fields. The defense counsel met with the experts and discussed their findings and conclusions. Short of hiring another expert to evaluate the first experts there was no way the defense counsel could be expected to know whether or not they were competent. In a similar case, the appellant alleged ineffective assistance of counsel in connection with his attorney's choice of psychiatric experts. *Harris v. Vasquez*, 949 F.2d 1497. The court held that it is certainly within the wide range of professionally competent assistance to rely on properly selected experts. 949 F.2d at 1525. In the appellant's case, there were no facts alleged that indicated counsel should not have selected either of the two experts or that there was any reason to believe either one was incompetent or their credentials deficient.

Finally, the appellant claims his trial defense counsel was ineffective because he failed to raise the defenses of lack of mental responsibility and lack of a specific intent to kill. The appellant alleges that because of the lack of investigation the defense counsel was unaware that these defenses existed. We find the defense counsel's decision not to raise these defenses was a tactical one and cannot be categorized as incompetent performance. The appellant had undergone extensive mental health examinations and the experts all agreed that he was mentally competent and did not lack mental responsibility. Moreover, it is clear from the psychiatrist reports that the appellant was mentally capable of forming a specific intent to kill.

XIX. PRETRIAL PUBLICITY

The appellant contends that he was denied a fair trial by an impartial court-martial panel in violation of the Fifth, Sixth, and Eighth Amendments because of prejudicial pretrial publicity. We disagree.

The Supreme Court held in *Irwin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961), that the trial court's findings ofjuror impartiality may be overturned only for "manifest effor." There are two standards by which to-judge prejudicial pretrial publicity. The first, presumed prejudice, is rarely applicable and is reserved for extreme situations. *Nebraska Press Assn v. Stuart*, 427 U.S. 539, 554, 96 S.Ct. 2791, 2800, 49 L.Ed.2d 683 (1976). In order to show presumed prejudice, the appellant must show that the pretrial publicity is prejudicial and inflammatory and it saturated the community. To show saturation, there must be evidence of the amount of pretrial publicity and the number of individuals exposed to it. *Mayola v. State of Alabama*, 623 F.2d 992 (5th Cir. 1980), *cert. denied*, 451 U.S. 913, 101 S.Ct. 1986,

68 L.Ed.2d 3 03 (198 1). The appellant's case does not meet the level needed for presumed prejudice. The second standard is actual prejudice. *Irwin v. Dowd*, 366 U.S. at 721-28, 81 S.Ct. at 164145. The extensive individual voir dire in this case proves there was no actual prejudice. Each member was questioned as to what he had heard or read about the case and whether he had formed a prior opinion of the appellant's guilt or innocence. All the members stated they had not yet formed an opinion. *See United States v. Smith*, *I* M.J. 1204 (N.C.M.R. 1977), *pet. denied*, 3 M.J. 164 (C.M.A. 1977) (even if members have heard or read about the case it is not a sufficient basis for change of venue as long as they deny being influenced); *but see Mayola v. State of Alabama*, 623 F.2d at 1001 (one cannot determine jurors are impartial based upon the individual member's assertion that he or she is impartial). The judge can determine whether the members are impartial based on the individualized voir dire. *Yount v. Patton*, 710 F.2d 956, 979 (3rd Cir. 1983), *cert granted*, 464 U.S. 913, 104 S.Ct. 272, 78 L.Ed.2d 254 (1983), *reversed by*, 467 U.S. 1025, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984) (skillful voir dire should be adequate to identify juror bias even when community is saturated with publicity). In addition, an impartial juror does not have to be one who is wholly ignorant of the case. *Mayola* at 998.

XX. DEFENSE REQUEST FOR MISTRIAL

The appellant contends that the military judge improperly denied a defense request for a mistrial based on the trial counsel's comments on the appellant's silence and courtroom demeanor. The contention is without merit.

The appellant cites only one specific instance where the trial counsel commented on the appellant's

demeanor and lack of remorse.[10] The cited remark was made during the sentencing argument. This Court recently held that comments on lack of evidence of remorse are not improper. *United States v. Carroll*, 34 M.J. 843 (A.C.M.R. 1992); *see also United States v. Herrington*, 2 M.J. 807 (A.C.M.R. 1976) (comment concerning lack of remorse by the appellant improper but error waived by lack of objection); *UnitedStates v. Gibson*, 30 M.J. 1138 (A.F.C.M.R. 1990), *review denied*, 32 M.J. 247 (C.M.A. 1990) (argument that the defendant did not express remorse not improper); *but see United States v. Turner*, 30 M.J. 1183 (A.F.C.M.R. 1990), *on rehearing*, 34 M.J. 1123 (A.F.C.M.R. 1992) (argument that defendant can't admit what he did found to be plain error); *United States v. Jones*, 30 M.J. 898 (A.F.C.M.R. 1990), *review denied*, 32 M.J. 371 (C.M.A. 1990) (pointing out defendant's lack of acknowledgment of guilt in sentencing argument held to be plain error).

This Court has also recently held that a comment on the appellant's "cold as ice" demeanor was cured by the judge's instruction on the appellant's right to remain silent. *UnitedStatesv.Kirks*, 34 M.J. 646 (A.C.M.R. 1992). Such a curative instruction was given in this case.[11]

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[10] Trial Counsel said "has he ever indicated to you by his actions any remorse for what he's done?" (R. 2537).

[11] Almost immediately after the trial counsel's argument, the military judge instructed the court members in pertinent part:

> With regard to counsel's indication, or phrase, "has the accused indicated by his actions any remorse?" That is susceptible of an interpretation of a comment upon his—the accused having remained silent and not having testified in the case, as I'm sure you are aware. The right to remain silent is a constitutional guarantee of all of us, and no inference—adverse inference may be

(continued...)

XXI. REASONABLE DOUBT INSTRUCTION

The appellant contends that the instructions to the court members which purported to define reasonable doubt violated the appellant's right to due process of law by lessening the government's burden of proof. W e disagree.

The instructions given by the military judge are virtually identical to the instructions found in the benchbook,[12] except for the first line in which he says "a doubt founded in reason." The appellant relies almost exclusively upon the *Cage* decision which reversed a conviction because the jury instructions equated reasonable doubt with "grave uncertainty" and "actual substantial doubt." *Cage v. Louisiana*, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990); *see Gaskins v. McKellar* ___ U.S. ___, 111 S.Ct. 2277, 114 L.Ed.2d 728 (1991).

There are two problems with appellant's reliance on *Cage*. First, in the appellant' s case reasonable doubt

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[11] (continued...)

> drawn from the fact that the accused elected not to testify in this case. And I'm sure that you will not draw any such adverse inference, nor read into it—the counsel's—trial counsel's closing argument, that that was a comment upon his right to remain silent.

[12] Dep't of Army Pam. 27-9, Military Judges' Benchbook, para. 2-29.1 (1 May 1982) (C3, 15 Feb. 1989). The first sentence of the reasonable doubt instruction reads: "By 'reasonable doubt' is intended not a fanciful or ingenious doubt or conjecture, but an honest, conscientious doubt suggested by the material evidence or a lack of it in the case." The military judge instructed: "A 'reasonable doubt' is what the words imply, a doubt founded in reason. It is not a fanciful or ingenious doubt, or conjecture,but an honest,conscientious doubt suggested by the material evidence or a lack of it in the case."

is not compared to grave uncertainty or actual substantial doubt. Second, the precedential value of *Cage* is questionable in light of the Supreme Court's recent repudiation of the analytical standard underlying its decision in *Cage*. *See Estelle v. McGuire*, ___ U.S. ___, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991). The test now is whether there is a reasonable likelihood that the jury-has applied the challenged instruction in away that violates the Constitution. *Id.* Inaddition, contrary to the appellant's assertion, the language "to a moral certainty" is proper. *Hatheway v. Secretary of the Army*, 641 F.2d 1376 (9th Cir. 1981), *cert. denied*, 454 U.S. 864, 102 S.Ct. 324, 70 L.Ed.2d 164 (1981).

XXII. PROPORTIONALITY REVIEW

The Court of Military Appeals recognized that a proportionality review is not required by the Eighth Amendment, but held that such a review is encompassed under this Court's obligation under Article 66(c), UCMJ. *United States v. Curtis*, 32 M.J. 252, 270 (C.M.A. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 406, 116 L.Ed.2d 354 (1991); *United States v. Curtis*, 33 M.J. 101 (C.M.A. 1991). In accordance with *Curtis*, before a death sentence can be approved we must determine:

> (c) whether the death sentence adjudged is proportionate to other death sentences that have been imposed [using generally similar cases reviewed by the Supreme Court of the United States in which state courts have imposed the death penalty for like crimes on that basis. 33 M.J. at 109].

Curtis, 32 M.J. at 271.

We have examined a number of cases and have concluded that the sentence is generally proportional to

those imposed by other jurisdictions in similar situations.[13] *See Loving*, 34 M.J. at 969-70.

XXIII. SENTENCE APPROPRIATENESS

To determine whether the sentence to death is appropriate in this case we must determine three things:

Curtis, 32 M.J. at 271.

> (a) whether one or more valid aggravating factors have been unanimously found by the court-martial and this finding is factually and legally correct; (b) if any corrective action results in setting aside any such finding but leaves intact at least one "aggravating factor" whether this error affected imposition of the sentence; ... and (d) whether under all of the facts and circumstances of the case the death sentence is appropriate, Art. 66 (c).

Accordingly, we have independently weighed the evidence and agree with each of the aggravating factors found by the court-martial. We find that each aggravating factor in this case, standing alone, is sufficient to authorize the death penalty. We also find that any extenuating and mitigating circumstances[14] are substantially outweighed by the aggravating cir-

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[13] A computer search was used to examine cases reviewed by the Supreme Court since the reinstatement of the death penalty following *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). Among the cases examined were *Boyde v. California*, 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990); *Walton v. Arizona*, 497 S.Ct. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990); *Clemons v. Mississippi*, 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725, (1990); *Blystone v. Pennsylvania*, 494 U.S. 299, 110 S.Ct. 1078, 108 L.Ed.2d 255 (1990); and *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983).

cumstances. We conclude that the sentence is appropriate for the crimes of which the accused stands convicted.

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), we have also considered the personal assertions of the appellant and find them to be without merit.

For the foregoing reasons, the Petition for New Trial is denied. The findings of guilty and the sentence are affirmed.Judge GRAVELLE and Judge JOHNSTON concur.

FOR THE COURT:

WILLIAM S. FULTON, JR.

Clerk of Court

APPENDIX

UNITED STATES ARMY COURT OF MILITARY REVIEW

Before

NAUGHTON, HOWELL, and JOHNSTON,

Appellate Military Judges

UNITED STATES, Appellee

v.

Specialist Four RONALD A. GRAY,

United States Army, Appellant

ACMR 8800807

ORDER

WHEREAS, this case is currently scheduled for oral argument before the United States Army Court of Military Review, Panel 4, on 13 November 1991 at 0900 hours; and

WHEREAS, the pleadings in this case have been before this Court for the past fifteen months (July 1990) and oral argument has been scheduled at various times since 5 December 1990; and WHEREAS, on 27 December 1990, the appellant filed a petition (motion) before this Court requesting that the Government provide the appellant with $15,000.00 to be used by appellate defense counsel to retain a mental health expert, an attorney qualified under the standards of the American Bar Association to represent defendants in capital cases, and a qualified investigator to assist with appellant's appeals; and

WHEREAS, this Court denied that petition on 12 March 1991 *(United States v. Gray,* 32 M.J. 730 (A.C.M.R. 1991)); and

WHEREAS, this Court previously determined that appellant's counsel was "qualified" within the meaning of Articles 27 and 70, Uniform Code of Military Justice, 10 U.S.C. §§ 827, 870, as well having satisfied the Alternate Procedures of the American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases *(United States v. Gray,* 32 M.J. at 734); and

WHEREAS, this Court has also previously held in *United States v. Gray,* 32 M.J. at 735, that "[w]e will intervene, when requested, to ensure counsel's case load and management pressures do not compromise the quality of capital case representation"; and

WHEREAS, on 7 August 1991, appellant filed a second petition (motion) before this Court requesting the Government be ordered to provide $10,000.00 to be used by appellate defense counsel to retain a mental health expert and a qualified investigator; and

WHEREAS, that motion was denied on 23 August 1991; and

WHEREAS, on 21 September 199 1, the appellant petitioned the United States Court of Military Appeals for extraordinary relief in the nature of a writ of mandamus to order the Government to provide $ 10,000.00 to be used by appellate defense counsel to retain a mental health expert and a qualified investigator to evaluate appellant and to assist in the appeal of his convictions and death sentence, and an emergency stay of the proceedings in the Army Court of Military Review; and

WHEREAS, on 18 October 1991, the United States Court of Military Appeals denied the writ appeal petition and application for emergency stay; and

WHEREAS, on 7 November 1991, appellate defense

counsel has now requested to withdraw as attorney for the appellant; and

WHEREAS, the appellate defense counsel has stated he is unable to provide the appellant with quality, competent representation because he needs funding to obtain experts to assist him, and his current work load does not allow him adequate time to prepare; and

WHEREAS, the Chief of the Defense Appellate Division has responded to this Court that the sole appellate defense counsel for the appellant in this case has long expressed his concerns about his competence to represent a capital client on appeal, the fact that such appellate defense counsel must bear a flnormal" case load in addition to this case, and that there is no additional manpower to afford the Chief of the Defense Appellate Division flexibility to substantially lighten appellate defense counsel's work load despite the persistent efforts to have more attorneys assigned to the Defense Appellate Division; and

WHEREAS, the Chief of the Defense Appellate Division has further responded that there is no counsel within the Defense Appellate Division more competent or qualified to represent the appellant than his current appellate defense counsel; and

WHEREAS, this Court finds that appellate defense counsel is qualified and competent to represent the appellant; and

NOW, THEREFORE, in response to appellate defense counsel's motion to withdraw as attorney for appellant , it is by this Court, this date

ORDERED:

1. That the "Motion to Withdraw as Attorney for Appellant" is denied.

2. That the matter of the Government providing funds for appellate defense counsel to retain a mental health expert and a qualified investigator, having been raised twice before this Court and once before the United States Court of Military Appeals and resolved on all occasions against the appellant, is no longer an issue before this Court.

3. That because of the circumstances of this particular case, except for those cases in which appellate defense counsel is currently scheduled to orally argue before this Court or the United States Court of Military Appeals, all of the remaining case load which appellate defense counsel currently has shall be delayed or reassigned to other counsel within the Defense Appellate Division by the Chief of the Defense Appellate Division until completion of oral argument in this case (unless appellate defense counsel determines he can adequately represent the appellant with a reduced case load as is best determined by him). Additionally, appellate defense counsel will not be assigned any new cases until completion of oral argument in this case.

4. That appellate defense counsel's motion to withdraw, this court's order of 8 November 1991, the response to that order by the Chief of the Defense Appellate Division, and this order be provided to The Judge Advocate General.

5. That the appellant's case is rescheduled for oral argument before the United States Army Court of Military Review, Panel 4, on I I March 1992 at 0900 hours, and any additional pleadings filed by appellate defense counsel are due on or before 12 February 1992.

Date: 12 November 1991

FOR THE COURT:

WILLIAM S. FULTON, JR.

Clerk of Court

APPENDIX C

UNITED STATES ARMY COURT OF MILITARY REVIEW

UNITED STATES, Appellee

v.

Specialist Four RONALD A. GRAY,

United States Army, Appellant

ACMR 8800807

9 June 1993

Accused was convicted by general court-martial convened at Fort Bragg, North Carolina, R.C. McRorie, J., of murder, rape, larceny, robbery, sodomy, and burglary. The United States Army Court of Military Review affirmed, 37 M.J. 730. On petition for rehearing, the United States Army Court of Military Review, Naughton, Senior Judge, held that: (1) accused was not entitled to indictment; (2) accused was not entitled to trial by jury; (3) court's instructions were proper; and (4) death penalty did not violate Eighth Amendment.

Affirmed.

For Appellant: Colonel Robert B. Kirby, JAGC, Lieutenant Colonel Russell S. Estey, JAGC, Major Michael J. Kelleher, JAGC, Major James M. Heaton, JAGC, Captain Michael J. Berrigan, JAGC, Captain Jon W. Stentz, JAGC, Captain Keith W. Sickendick, JAGC, Captain Cynthia Wright, JAGC, Captain Jeffrey J. Fleming, JAGC, Captain Michael E. Smith, JAGC, Captain Christopher W. Royer, JAGC (on brief).

For Appellee: Colonel Alfred F. Arquilla, JAGC, Lieutenant Colonel Daniel J. Dell'Orto, JAGC, Major Gary L. Hausken, JAGC, Major Joseph C. Swetnam, JAGC, Major Timothy W. Lucas, JAGC, Captain Jonathan F. Potter, JAGC, Captain Randy V. Cargill, JAGC, Captain Donald W. Hitzeman, JAGC, Captain Glenn L. Kirschner, JAGC (on brief).

Before

NAUGHTON, GRAVELLE, and JOHNSTON,

Appellate Military Judges

OPINION OF THE COURT ON SUPPLEMENTAL ASSIGNMENT OF ERRORS

NAUGHTON, Senior Judge:

The court denied a petition for a new trial and affirmed the findings and sentence in this death-penalty case on 15 December 1992.[1] *United States v. Gray*, 3 7 M.J. 73 0 (A.C.M.R. 1992). That same date, the appellant filed a motion for reconsideration of our decision denying the appellant's motion to abate the proceedings to ensure that the appellant, as a result of an apparent drug overdose, had suffered no permanent brain damage which would prevent his full participation in assisting with his appeal. That motion was denied on 30 December 1992. On 30 December 1992, the appellant filed a motion for funding an expert investigator and behavioral neurologist. On 4 January 1993, the appellant petitioned for reconsideration of our 15 December 1992

[1] The procedural history of the appellant's case prior to 15 December 1992 is contained in *United States v. Gray*, 37 M.J. 730 (A.C.M.R. 1992).

decision. On 14 January 1993, the appellant filed a motion for reconsideration and suggestion for *en banc* reconsideration of the motion to abate the proceedings. [2]

Pursuant to a request for oral argument, argument on the motion for funding was held on 21 January 1993. These motions and the petition for reconsideration were denied by the court on 22 January 1993. On 11 February 1993, the appellant filed a motion and suggestion for *en banc* reconsideration of the denial of the motion for funding an expert investigator and behavioral neurologist and a motion and suggestion for *en banc* reconsideration of our 15 December 1992 decision. These motions were denied by the court on 11 March 1993. On that same day, this court granted the defense's motion for leave to file supplemental assignment of errors. The appellant filed a brief containing supplemental assignments of error XXVIII thru LVI. It is these supplemental assignments of error that we will now address.[3]

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[2] *En banc* "proceedings" do not contemplate the reconsideration of interlocutory matters such as motions to abate. *See* Internal Rules, United States Army Court of Military Review, Rule 17. 1 (a).

[3] We note as did Senior Judge De Giulio in *United States v. Murphy*, 36 M.J. 1137 (A.C.M.R. 1993), that many of the—

> appellant's constitutional and procedural challenges to the military justice system and capital punishment have been resolved adversely to him by prior decisions of the United States Court of Military Appeals. *See United States v. Weiss*, 36 M.J. 224 (C.M.A. 1992)-l *United States v. Graf*, 35 M.J. 450 (C.M.A. 1992); *United States v. Curtis*, 32 M.J. 252 and 33 M.J. 101 (C.M.A. 1991); *UnitedStates v. Matthews*, 16 M.J. 354 (C.M.A. 1983). Other issues raised were addressed in Senior Judge Foreman's opinion in thiscase,whichweadoptasdispositiveoftheseissues. *[UnitedStatesv.]Murphy,30* M.J. 1040 [(A.C.M.R. 1990)].

XXVIII

APPELLANT'S COURT-MARTIAL LACKED JURISDICTION BECAUSE THE MILITARY JUDGE WAS DESIGNATED IN VIOLATION OF THE APPOINTMENTS CLAUSE OF THE CONSTITUTION. *See generally* U.S. Const. Art. II, section 2, cl. 2; *Freytag v. Commissioner of Internal Revenue*, ___ U.S. ___, 111 S. Ct. 2631, 115 L.Ed.2d 764 (1991). *But see United States v. Weiss*, 36 M.J. 224 (C.M.A. 1992). BECAUSE THIS ERROR IS JURISDICTIONAL, AND THE RECORD CONTAINS NO EVIDENCE OF A KNOWING WAIVER, THE ISSUE IS NOT WAIVED BY A FAILURE TO RAISE IT AT TRIAL. *But see United States v. Claxton*, 34 M.J. 1112 (C.G.C.M.R. 1992); *United States v. Prive*, 35 M.J. 569 (C.G.C.M. R. 1992).

The appellant's assertion is rejected in light of *United States v. Weiss*, 36 M.J. 224 (C.M.A. 1992), *cert. granted*, _ U. S. 113 S.Ct. 2412, 124 L.Ed.2d 635 (1993).

XXIX

UNIFORM CODE OF MILITARY JUSTICE art. 18, 10 U.S.C. § 818 (1992) [hereinafter UCMJ] AND MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984, RULE FOR COURTS-MARTIAL 201(f)(1)(C) [hereinafter R.C.M.], WHICH REQUIRE TRIAL BY MEMBERS IN A CAPITAL CASE, VIOLATES THE FIFTH AND EIGHTH AMENDMENT GUARANTEE OF DUE PROCESS AND A RELIABLE VERDICT.

We disagree. Jury trials are deeply rooted in jurisprudential tradition as a means of fostering due process and

preventing cruel and unusual punishment. *See United States v. Matthews*, 16 M.J. 354, 363 (C.M.A. 1983).

XXX

APPELLANT WAS DENIED HIS FIFTH AMENDMENT RIGHT TO A GRAND JURY PRESENTMENT OR INDICTMENT.

The Fifth Amendment provides in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a present merit or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in *the Militia, when in actual service in time of War or public danger; . . .*" (Emphasis added).

U.S. Const. amend. V.

The appellant's assertion must be rejected in light of *Johnson v. Sayre*, 158 U.S. 109, 15 S.Ct. 773, 39 L.Ed. 914 (1895). The language "when in actual service in time of War or public danger," does not modify the words "land and naval forces" but only modifies the words "the Militia." *Thompson v. Willingham*, 318 F.2d 657 (3d Cir. 1963). *See generally Solorio v. United States*, 483 U.S. 435, 107 S.Ct. 2924, 97 L.Ed.2d 364 (1987).

XXXI

COURT-MARTIAL PROCEDURES DENIED APPELLANT HIS ARTICLE III RIGHT TO A JURY TRIAL.

This supplemental assignment of error is without merit. A court-martial has never been subject to the jury-trial demands of Article III of the Constitution. *Ex Parte Quirin*, 317 U.S. 1, 63 S.Ct. 2, 87 L.Ed. 3 (1942); *Ex Parte Milligan*, 71 U.S. (4 Wall) 2, 18 L.Ed. 281

(1866); *United States v. McClain*, 22 M.J. 124 (C.M.A. 1986).

XXXII

THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS DO NOT PERMIT, IN PEACETIME, A CONVENING AUTHORITY TO HAND-PICK MILITARY SUBORDINATES, WHOSE CAREERS HE CAN DIRECTLY AND IMMEDIATELY AFFECT AND CONTROL, AS MEMBERS TO DECIDE A CAPITAL CASE FOR OFFENSES THAT OCCUR ON A MILITARY BASE BUT WHERE THERE IS CONCURRENT JURISDICTION WITH A STATE AUTHORITY.

This supplemental assignment of error is also without merit. *See* UCMJ art. 25, 10 U.S.C. § 825.

XXXIII

COURT-MARTIAL PROCEDURES DENIED APPELLANT HIS SIXTH AMENDMENT RIGHT TO JURY TRIAL AND AN IMPARTIAL CROSSSECTION OF THE COMMUNITY.

The appellant's assertion is without merit. The appellant does not have a right to ajury trial or to a representative cross-section of the community on ajury panel. *UnitedStates v. Santiago-Davila, 26* M.J. 380 (C.M.A. 1988). *See* UCMJ art. 25.

XXXIV

THE PEREMPTORY CHALLENGE PROCEDURE IN THE MILITARY JUSTICE SYSTEM CONSTITUTES AN UNCONSTI-

TUTIONAL VIOLATION OF THE FIFTH AND EIGHTH AMENDMENTS IN CAPITAL CASES WHERE THE PROSECUTOR IS FREE TO REMOVE A MEMBER WHOSE MORAL BIAS AGAINST THE DEATH PENALTY DOES NOT JUSTIFY A C14ALLENGE FOR CAUSE.

We have already addressed and rejected this issue in this case. *United States v. Gray*, 37 M.J. 730, 737-38 (A.C.M.R. 1992); *See also United States v. Loving*, 34 M.J. 956, 967-68 (A.C.M.R. 1992).

XXXV

THE DESIGNATION OF THE SENIOR MEMBER AS THE PRESIDING OFFICER FOR DELIBERATIONS DENIED THE APPELLANT DUE PROCESS OF LAW AND A FAIR AND IMPARTIAL MEMBER'S CONSIDERATION OF THE EVIDENCE, BY ESTABLISHING THE SENIOR MEMBER'S SUPERIORITY IN AND CONTROL OF THE DELIBERATION PROCESS.

The appellant provides no basis for his assertion; therefore, it is rejected. We note that the military judge instructed all members that "[e]ach of you has an equal voice and vote with the other members in discussing and deciding all issues submitted to you. The senior member's vote counts as one, just as does the junior member's." Additionally, the military judge instructed the court members that "[t]he influence of superiority in rank will not be employed in any manner to attempt to control the independence of the members in the exercise of their own personal judgment." In the absence of evidence to the contrary, the members are presumed to

have followed the military judge's instructions. *United States v. Holt*, 33 M.J. 400, 408 (C.M.A. 1991).

XXXVI

THE MILITARY JUDGE COMMITTED PLAIN ERROR BY FAILING TO INSTRUCT THE MEMBERS ON SENTENCING AS TO THE TERM "SUBSTANTIALLY OUTWEIGHED" WITH REGARD TO THE RELATIONSHIP OF MITIGATING CIRCUMSTANCES TO AGGRAVATING FACTORS.

We find that this issue has no merit. The Supreme Court has made it clear that it is not constitutionally required to have a specific standard for balancing aggravating and mitigating factors. *Zant v. Stephens*, 462 U.S. 862, 875 n. 13, 103 S.Ct. 2733, 2742 n.13, 77 L.Ed.2d 235 (1983) (citing *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976)). In *Jurek*, the Supreme Court held that the four categories of murders Texas uses for the imposition of the death penalty serves the same safeguard purpose as the list of aggravating factors used by other jurisdictions to balance against mitigating factors prior to the imposition of the death penalty.

XXXVII

THE FINDINGS MUST STATE EXPLICITLY THAT ALL MEMBERS CONCUR THAT ANY EXTENUATING OR MITIGATING CIRCUMSTANCES ARE SUBSTANTIALLY OUTWEIGHED BY THE AGGRAVATING FACTORS FOUND BY THE MEMBERS.

There is nothing in the record that suggests that the members did not unanimously determine that the

aggravating factors substantially outweighed the mitigating factors. On the contrary, the findings worksheet specifically states that "[t]he court-martial *unanimously* finds any and all extenuating and mitigating factors are substantially outweighed by the aggravating factors. . . . . " (Emphasis added). What the appellant is asking this court to do is to require the polling of the court members. Although Judge Cox expressed the belief that "fundamental notions of fairness require that each member of the courtmartial sign his or her name to the death-sentence worksheet or that the condemned accused have the right to poll the members" despite the polling prohibition in R.C.M. 922(e), *United States v. Curtis*, 3 3 M.J. 101, 110 (C.M.A. 1991) (Cox, J., concurring), neither the Code nor the Manual for Courts-Martial expressly authorizes such procedures. *United States v. Hendon*, 6 M.J. 171, 173-74 (C.M.A. 1979). We find the appellant's assertion to be without merit.

XXXVIII

THE MILITARY JUDGE'S INSTRUCTION THAT "YOU MAY NOT ADJUDGE A SENTENCE OF DEATH UNLESS YOU FIND THAT ANY AND ALL EXTENUATING OR MITIGATING CIRCUMSTANCES ARE SUBSTANTIALLY OUTWEIGHED BY ANY AGGRAVATING FACTORS..." DID NOT SUFFICIENTLY INFORM THE MEMBERS THAT THIS FINDING MUST BE UNANIMOUS.

The military judge gave the members the following instruction:

> If you fail to find unanimously that at least one of the aggravating factors existed, then you

> may not adjudge a sentence of death. If, however, you determine that at least one of the aggravating factors existed, then you may consider, along with all other appropriate sentence possibilities, whether a sentence of death should be adjudged. In this regard, *you may not adjudge a sentence of death unless youfind, by unanimous vote-again, by all members—that any and all extenuating and mitigating factors are substantially outweighed by any aggravating factors,* including the factors which you've previously found existed in the first step of this procedure.

(Emphasis added).

We find the military judge's instructions to be sufficient and, therefore, the appellant's assertion is without merit.

XXXIX

> MILITARY DUE PROCESS AND UCMJ ARTICLES 66 AND 67 REQUIRE THE COURT OF MILITARY APPEALS AND THE COURTS OF MILITARY REVIEW TO REVIEW ALL CAPITAL CASES *IN FA VOREM VITAE* SINCE CAPITAL LITIGATION IS IN ITS INFANCY IN THE MILITARY JUSTICE SYSTEM AND TRIAL AND APPELLATE DEFENSE COUNSEL LACK THE TRAINING AND EXPERIENCE NECESSARY TO PRESERVE THE RECORD ON ALL ISSUES AND PREVENT APPLICATION OF WAIVER.

This court has reviewed the entire record of trial for errors, whether they be specifically assigned by the

appellate defense counsel or not, in accordance with Article 66, UCMJ, 10 U.S.C. § 866.

Moreover, although we may apply waiver under certain circumstances, we are not required to do so. *See United States v. Claxton*, 32 M.J. 159 (C.M.A. 1991); *United States v. Cole*, 31 M.J. 270 (C.M.A. 1990). We also, once again, specifically reject the assertion that trial and appellate defense counsel lack the training and experience to participate in capital litigation. *See United States v. Gray*, 37 M.J. 730, at 734-35, n. 3 and 4 (A.C.M.R. 1992).

XL

THE DEATH PENALTY SENTENCING STANDARD REQUIRING AGGRAVATING FACTORS TO "SUBSTANTIALLY OUTWEIGH" EXTENUATING AND MITIGATION CIRCUMSTANCES IS IN VIOLATION OF THE FIFTH AND EIGHTH AMENDMENTS IN THAT THE ONLY ACCEPTABLE STANDARD MUST BE "BEYOND A REASONABLE DOUBT." *SEE ALSO* UCMJART.59(a), 10 U.S.C. § 859(a).

Based on our discussion for assignment of error XXXVII, we find that this assignment of error is also without merit.

XLI

THE MILITARY JUDGE ERRED IN VIOLATION OF THE FIFTH AND EIGHTH AMENDMENTS IN FAILING TO EXPLICITLY INSTRUCT THAT EVEN IF THE MEMBERS UNANIMOUSLY FOUND ONE

OR MORE AGGRAVATING FACTORS AND EVEN IF THE MEMBERS UNANIMOUSLY DETERMINE THAT THE EXTENUATING OR MITIGATING CIRCUMSTANCES ARE SUBSTANTIALLY OUTWEIGHED BY THE AGGRAVATING FACTORS, EACH MEMBER STILL HAD THE ABSOLUTE DISCRETION TO DECLINE TO IMPOSE THE DEATH SENTENCE.

This issue is without merit. The military judge made it abundantly clear to the members that they had the absolute right not to impose the death penalty when he gave them the following instruction:

> And, again, as the worksheet points out, those mitigating and extenuating factors must, be substantially outweighed by the aggravating factors that you found ... Assuming you got to that point and you unanimously found ... that the aggravating factors substantially outweighed all extenuating and mitigating factors, then you can proceed to vote on the remaining elements of the sentence. You don't have to, indeed, even if you were to do that, you may—you may not have to—you may not be of the mind to impose the death penalty. Assuming you reach those two stages, then your decision is: Shall we impose a sentence of death or life as to those two elements? There's—the fact that you found unanimously as to both those factors does not dictate death be imposed. It's your decision, but you can only impose a death sentence if you reach those two—go through those two stages unanimously.

XLII

THE MILITARY JUDGE ERRED IN VIOLATION OF THE FIFTH AND EIGHTH AMENDMENTS AND UCMJ ARTICLE 55 IN HIS FAILURE TO INSTRUCT THE PANEL MEMBERS THAT THE ONLY OFFENSES FOR WHICH APPELLANT COULD BE SENTENCED TO DIE WERE FELONY MURDER AND PREMEDITATED MURDER AND THAT APPELLANT COULD NOT BE SENTENCED TO DIE ON THE BASIS OF THE AGGREGATE OR CUMULATIVE EFFECT OF ALL THE OFFENSES.

The military judge properly instructed the court members in accordance with R.C.M. 1004(b)(6) and 1005(e)(1). Military law requires that the court members be instructed on a single maximum sentence for all of the offenses properly before the court- martial. Since the maximum sentence of death may be imposed when proper procedures are followed for the offenses of premeditated murder and felony-murder, the military-judge was correc tin his sentencing instructions to the jury. Accordingly,we find this assignment of error to be without merit. The appellant is asking this court to speculate as to whether the jury imposed the death sentence because of the murders he committed or because of all of the offenses he committed. The Supreme Court has refused to second guess the jury in death-penalty cases based on theoretical uncertainty. *See Drake v. Zant*, 449 U.S. 999, 1 01 S.Ct. 541, 66 L.Ed.2d 297 (1980); *Godfrey v. Georgia*, 446 U.S. 420, 1 00 S.Ct. 1759, 64 L.Ed.2d 398 (1980). *See generally United States v. Curtis*, 32 M.J. 252 (A.C.M.R. 1991).

XLIII

THE ROLE OF THE CONVENING AUTHORITY IN THE MILITARY JUSTICE SYSTEM DENIED APPELLANT A FAIR AND IMPARTIAL TRIAL BY ALLOWING THE CONVENING AUTHORITY TO ACT AS A GRAND JURY IN REFERRING CRIMINAL CASES (CAPITAL CASES) TO TRIAL, PERSONALLY APPOINTING JURORS OF HIS CHOICE, HOLDING THE ULTIMATE LAW ENFORCEMENT FUNCTION WITHIN HIS COMMAND, RATING THE STAFF JUDGE ADVOCATE WHO IS THE FUNCTIONAL EQUIVALENT TO THE CHIEF PROSECUTOR, AND ACTING AS THE FIRST LEVEL OF APPEAL, THUS CREATING AN APPEARANCE OF IMPROPRIETY IN A PERCEPTION THAT HE ACTS AS PROSECUTOR, JUDGE, AND JURY.

The appellant's assertion is without merit. The appellant failed to raise this issue at trial. Additionally, he has failed to demonstrate that he suffered prejudice due to the convening authority's role in his case. *United States v. Allen*, 31 M.J. 572, 584 (N.M.C.M.R. 1990), *affd*, 33 M.J. 209 (C.M.A. 1991), *cert. denied*, ___ U.S. ___, II 2 S.Ct. 1473, 117 L.Ed.2d 617 (1992). *See generally*, UCMJ art. 22 and *Curtis*, 32 M.J. 252.

XLIV

APPELLANT HAS BEEN DENIED EQUAL PROTECTION UNDER THE LAW IN VIOLATION OF THE FIFTH AMENDMENT IN THAT ALL OTHER CIVILIANS

IN THE UNITED STATES ARE AFFORDED THE OPPORTUNITY TO HAVE THEIR CASES REVIEWED BY AN ARTICLE III COURT, BUT MEMBERS OF THE UNITED STATES ARMY BY VIRTUE OF THEIR STATUS AS SERVICEMEMBERS ARE NOT.

This issue is without merit. *See Matthews*, 16 M.J. at 364-368.

XLV

THIS COURT DOES NOT HAVE THE JURISDICTION, NOR THE AUTHORITY TO REVIEW THE CONSTITUTIONALITY OF THE RULES FOR COURTS-MARTIAL AND THE UNIFORM CODE OF MILITARY JUSTICE BECAUSE THIS COURT IS AN ARTICLE I COURT, NOT AN ARTICLE III COURT WHICH HAS THE POWER TO CHECK CONGRESS AND THE EXECUTIVE UNDER *MARBURY* V *MADI* SON, 5 U. S. (I Cranch) 137, 2 L.Ed. 60 (1803).

This issue is without merit. *See Matthews*, 16 M.J. at 364-68.

XLVI

APPELLANT WAS DENIED DUE PROCESS OF LAW IN VIOLATION OF THE FIFTH AND EIGHTH AMENDMENTS BECAUSE HE WAS TRIED IN A PEACETIME CAPITAL CASE BY A COURT-MARTIAL PANEL (I.E. JURY) COMPOSED OF LESS THAN TWELVE MEMBERS.

This assignment of error was previously addressed in this case. *United States v. Gray*, 37 M.J. 730, at 733-34 and n.2 (A.C.M.R. 1992). Furthermore, this assertion is again rejected in accordance with *Curtis*, 32 M.J. 252.

XLVII

APPELLANT WAS DENIED HIS RIGHTS UNDER THE FIFTH AND SIXTH AMENDMENTS BECAUSE THE PANEL MEMBER SELECTION POOL IN APPELLANT'S CASE DID NOT INCLUDE ANY FEMALES.

The appellant did not raise this issue at trial. Additionally, a court-martial panel need not necessarily be representative cross-section of the population so, therefore, it need not include female members on the jury. *See United States v. Smith*, 27 M.J. 242, 248 (C.M.A. 1988); *Santiago-Davila*, *26* M.J. at 389. *See generally*, UCMJ art. 25.

XLVIII

THERE IS NO MEANINGFUL DISTINCTION BETWEEN PREMEDITATED AND UNPREMEDITATED NTURDER ALLOWING DIFFERENTIAL TREATMENT AND SENTENCING DISPARITY IN VIOLATION OF THE FIFTH AND EIGHTH AMENDMENTS AND UCMJ ARTICLE 55.

The distinction between premeditated and unpremeditated murder is that in order to prove the former the government must prove that, at the time of the murder, the accused had a premeditated design to kill whereas to prove the latter the government need only prove that, at the time of the murder, the accused had the

intent to kill or inflict great bodily harm. Manual for Courts-Martial, United States, 1984, Part IV, paras. 43b(l)(d) and 43b(2)(d). The difference is that one requires the intent to kill and consideration of the act intended while the other requires only the intent to kill or inflict great bodily harm but without the prior consideration of the act intended. "[P]remeditation only requires a cool mind to reflect on [the] intent to kill before committing the lethal act." *United States v. Viola*, 26 M.J. 822, 830 (A.C.M.R. 1988). "The military case law as to what constitutes 'premeditation,'and what that term means, is so well-established that it prevents discriminatory enforcement by the government, the trial court, and the fact-finders." *United States v. Mansfield*, 33 M.J. 972, 989 (A.F.C.M.R. 1991).

Accordingly, we find this assignment of error to be without merit. *See United States v. Teeter*, 16 M.J. 68 (C.M.A. 1983).

XLIX

THE MILITARY JUDGE'S INSTRUCTIONS BLURRED ANY DISTINCTION BETWEEN THE OFFENSES OF PREMEDITATED AND UNPREMEDITATED MURDER AND DELETED THE REQUIRED ELEMENT OF "PREMEDITATION" FROM THE OFFENSE OF PREMEDITATED MURDER IN VIOLATION OF THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS AND UCMJ ARTICLE 55.

The military judge properly instructed the court members on the elements and definitions of premeditated and unpremeditated murder. To emphasize the distinction between the two the military judge further instructed the court members as follows:

> You'll notice that the principal difference between this offense—that is, premeditated murder and unpremeditated murder is that there would—the accused must have had the premeditated design to kill, that is, had considered the act prior to the application of the force and must have had the specific intent to kill, whereas unpremeditated murder requires the specific intent to kill or inflict great bodily harm without premeditation.

We find no error in the military judge's instructions; accordingly, the assignment of error is without merit.

L

APPELLANT'S DEATH SENTENCE VIOLATES THE EIGHTH AMENDMENT'S PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT.

The death penalty does not violate the Eighth Amendment but the Eighth Amendment's prohibition against cruel and unusual punishment does prohibit the "arbitrary and capricious" imposition of the death penalty. In order to achieve this, the Supreme Court created the system by which the findings of aggravating factors are required prior to deliberations on sentencing. *See Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); and, *United States v. Murphy*, 30 M.J. 1040 (A.C.M.R. 1990). The case at bar has gone through the required two-step process set out in *Gregg*, therefore the appellant's assertion is without merit.

LI

RULE FOR COURTS-MARTIAL 1004 FAILS TO INCORPORATE CONGRES-

SIONALLY MANDATED PROTECTIONS TO PREVENT RACIALLY MOTIVATED IMPOSITION OF THE DEATH PENALTY IN VIOLATION OF UCMJ ARTICLE 55 AND THE EIGHTH AMENDMENT TO THE CONSTITUTION.

This assignment of error is without merit. There is no evidence the sentence to death in appellant's case was racially motivated. Further, the provisions cited by the appellant, although they may be desirable, have not been imposed on courts-martial and are not constitutionally mandated. *Curtis*, 32 M.J. at 268; and, *Murphy*, 30 M.J. at 1056.

LII

THE IMPOSITION OF THE DEATH PENALTY IN THIS CASE VIOLATED APPELLANT'S RIGHT TO EQUAL PROTECTION UNDER THE FIFTH AMENDMENT BECAUSE RULE FOR COURTS-MARTIAL 1004 SUBJECTED APPELLANT, AS A MEMBER OF THE ARMED FORCES, TO A PENALTY WHICH IS NOT OTHER WISE AVAILABLE UNDER THE CRIMINAL CODE OF THE UNITED STATES FOR IDENTICAL CRIMINAL CONDUCT.

The appellant has not been deprived of equal protection by virtue of his status as a member of the armed forces. *Murphy*, 30 M.J. at 1055. *See Curtis*, 32 M.J. at 261.

LIII

THE AGGRAVATING FACTORS ENUMERATED IN RULE FOR COURTS-MARTIAL

1004(C)(7)(1) FAIL TO SUFFICIENTLY CLARIFY THE FACTORS INVOLVED OR NARROW THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY AND THE RULE IS THEREFORE INVALID UNDER THE FIFTH AND EIGHTH AMENDMENTS.

Rule for Courts-Martial 1004 has sufficiently clarified the aggravating factors that are required prior to the imposition of a death sentence. Rule for Courts-Martial 1004 is more specific in prescribing aggravating factors than most state statutes. This issue is without merit. *See Curtis*, 32 M.J. at 255-267.

LIV

DUE PROCESS REQUIRES THAT TRIAL AND INTERMEDIATE APPELLATE JUDGES IN A PEACETIME MILITARY DEATH PENALTY CASE HAVE THE PROTECTION OF A FIXED TERM OF OFFICE. *But see United States v. Graf*, 35 M.J. 450 (C.M.A. 1992).

In light of *United States v. Graf* 35 M.J. 450 (C.M.A. 1992), *petition for cert. filed*, 61 U.S.L.W. 3500 (U.S. Dec. 29, 1992) (No. 92-1102), we find this issue to be without merit.

LV

THE SYSTEM OF APPOINTING CAPITAL COUNSEL IN THE UNITED STATES ARMY PREJUDICED APPELLANT BECAUSE HE IS NOT GUARANTEED EITHER CONTINUITY OF COUNSEL OR COMPETENT COUNSEL UNDER ANY OF

THE QUALIFICATIONS FOR CAPITAL ATTORNEYS IN FORCE IN ANY JURISDICTION IN AMERICA.

This issue is without merit. The appellant is asking this court to declare that all appellate defense counsel are per se incompetent to handle capital cases by virtue of their status as members of the United States Army. We refuse to do that. For assistance of counsel to be ineffective, there must be: (1) a showing that the performance was deficient, and (2) that but for the deficiency the result would have been different. Any question as to counsel's competence must undergo this two-step analysis. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *See generally United States v. Loving*, 34 M.J. 1065 (A.C.M.R. 1992). No such showing has been made out in this case that the performance of the appellant's trial or appellate defense counsel has been deficient. *See United States v. Gray*, 37 M.J. 730 at 734-35, n. 3 and 4 (A.C.M.R. 1992).

LVI

THE SYSTEM WHEREBY THE JUDGE ADVOCATE GENERAL OF THE ARMY APPOINTS TRIAL AND APPELLATE JUDGES TO SERVE AT HIS PLEASURE IS UNCONSTITUTIONAL AS IT VIOLATES THE APPOINTMENTS CLAUSE OF THE CONSTITUTION.

This issue has no merit. *See Weiss*, 36 M.J. 224.

After careful review of the appellant's supplemental assignments of error, the findings of guilty and the sentence are, again, affirmed.

Judge GRAVELLE and Judge JOHNSTON concur.

FOR THE COURT:

MARY B. DENNIS

Deputy Clerk of Court

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE ARMED FORCES

UNITED STATES, Appellee

v

Ronald A. GRAY, (261-69-7258), Appellant

USCA Dkt. No. 93-7001/AR

Crim. App. Dkt. No. 8800807

ORDER

On consideration of appellant's petition for reconsideration and motion for a hearing, it is, by the Court, this 26th day of June, 2000,

ORDERED:

That said motion to file second petition for reconsideration is granted;

That said motion for a hearing is denied; and

That the second petition for reconsideration is denied.

For the Court,

/s/ Thomas F. Granahan

Clerk of the Court

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE ARMED FORCES

UNITED STATES, Appellee

v

Ronald A. GRAY, (261-69-7258), Appellant

USCA Dkt. No. 93-7001/AR

Crim. App. Dkt. No. 8800807

ORDER

On consideration of appellant's petition for reconsideration of this Court's decision, 51 MJ 1 (1999) and motion for a hearing, it is, this 6th day of April, 2000,

ORDERED:

That said petition for reconsideration is hereby denied and

That said motion is hereby denied.

For the Court,

/s/ Thomas F. Granahan

Clerk of the Court

Supreme Court, U.S.
FILED
NOV 15 2000
CLERK

(2)

No. 00-607

IN THE

Supreme Court of the United States

RONALD A. GRAY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Armed Forces

BRIEF OF NATIONAL INSTITUTE OF MILITARY JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

STEPHEN A. SALTZBURG
720 20th Street, N.W.
Washington, DC 20052
(202) 994-7089

KEVIN J. BARRY
13406 Sand Rock Court
Chantilly, VA 20151
(703) 968-7247

PHILIP D. CAVE
515 King St., Ste. 420
Alexandria, VA 22314
(703) 549-6075

EUGENE R. FIDELL
(Counsel of Record)
FELDESMAN, TUCKER, LEIFER,
FIDELL & BANK LLP
2001 L St., N.W., 2d Floor
Washington, DC 20036
(202) 466-8960

Attorneys for National Institute of Military Justice

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The National Institute of Military Justice ("NIMJ") respectfully submits this brief *amicus curiae* in support of the petitioner with regard to the second question presented. NIMJ takes no position on the first and third questions presented or the proper resolution of the second issue.

INTEREST OF THE *AMICUS CURIAE*

NIMJ is a District of Columbia nonprofit corporation organized in 1991.[1] Its overall purpose is to advance the fair administration of justice in the Armed Forces of the United States. NIMJ fosters improved public understanding by such means as publication of the *Guide to the Rules of Practice and Procedure for the United States Court of Appeals for the Armed Forces* and the monthly *Military Justice Gazette*, and the sponsorship of seminars and training programs. Notably, in 1998 NIMJ sponsored an international conference on "Continuity and Change in Military Justice," in London. *See* http://www.freeyellow.com/members/5/uppmlj/erflon.htm. NIMJ has also commented on and proposed changes to military procedural rules, testified before Congress, and appeared as an *amicus curiae* in the United States Court of Appeals for the Armed Forces and before this Court at the petition stage in *Clinton v. Goldsmith*, 526 U.S. 529 (1999). NIMJ's directors include law professors, private practitioners and other experts in the field, none of whom is currently on active duty, but nearly all of whom have served as active duty military lawyers, up to and including flag and general officer ranks. NIMJ is entirely independent of the government and relies exclusively on voluntary contributions for its programs.

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[1] No counsel for a party authored this brief in whole or in part. No person or entity other than the *amicus* made a monetary contribution to the preparation or submission of this brief.

Counsel for the parties have consented to the filing of this brief. Copies of their responses to our requests for consent have been lodged with the Clerk.

ARGUMENT

I

FOREIGN CASE LAW DEMONSTRATES THE IMPORTANCE OF DETERMINING WHETHER THE CONVENING AUTHORITY'S SELECTION OF MEMBERS IN CAPITAL COURTS-MARTIAL IS CONSTITUTIONAL

The second question presented concerns the constitutionality of Article 25(d)(2) of the Uniform Code of Military Justice ("UCMJ"), which directs convening authorities to select court-martial members who "are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." 10 U.S.C. § 825(d)(2) (1994). Recent foreign cases address the issue of commanding officers' power to handpick court-martial members from among their subordinates. This jurisprudence indicates that the method of court-martial member selection is one of the most fundamental and important legal questions currently faced by military justice in democratic societies.

Petitioner points to the Canadian Supreme Court's decision in *R. v. Généreux*, [1992] 1 S.C.R. 259, and the European Court of Human Rights' decision in *Findlay v. United Kingdom*, 1997-I Eur. Ct. H.R. 263. Pet. at 21-22. *Findlay*, which held that the British Army Act 1955 violated the European Charter of Human Rights by allowing convening authorities to appoint court-martial members, is but one of a

series of European cases considering the issue. The European Commission of Human Rights similarly concluded that convening authorities' appointment of naval court-martial members deprived those tribunals of independence and impartiality in violation of Article 6 of the Charter. *Lane v. United Kingdom*, App. No. 27347/95 (Eur. Comm'n of H.R. Oct. 21, 1998), *available at* http://www.dhcour.coe.fr/Hudoc2doc2/HEREP/199910/27347r31.ex.doc.[2] The European Court reached a similar conclusion regarding Royal Air Force courts-martial. *Coyne v. United Kingdom*, 1997-V Eur. Ct. H.R. 1842.

The decisions invalidating the procedures for selecting British Army and Royal Navy court-martial members are particularly significant. John Adams, principal author of the 1775 Rules for the Regulation of the Navy of the United Colonies of North America and the 1776 Articles of War for the Continental Army, patterned both after their British counterparts. *See* 5 J. Cont. Cong. 670-71 n.2 (1776); 3 *Papers of John Adams* 147-56 (Robert J. Taylor ed., 1979). The Uniform Code of Military Justice thus shares a common ancestry with the British systems found insufficiently independent in *Findlay* and *Lane*.[3]

A South African court cited *Généreux* and *Findlay* in the course of holding that that country's courts-martial were insufficiently independent of the Executive Branch, although it did so on grounds other than the convening authority's selection of the members. *Freedom of Expression Inst. v. President, Ordinary Court Martial*, 1999 (3) BCLR 261

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[2] The Council of Europe's Committee of Ministers has adopted the Commission's conclusion. *See* Resolution DH (2000) 92 (Comm. of Ministers, Council of Eur. July 24, 2000), *available at* http://www.dhcour.coe.fr/Hudoc2doc2/HERES32/200010/eresdh2000.92.doc.

[3] The Canadian system invalidated in *Généreux* shares that common ancestor as well. *See* Eugene R. Fidell, *A World-Wide Perspective on Change in Military Justice*, 48 A.F. L. Rev. 195, 206 (2000) (noting that common law democracies trace their military justice systems to the British Articles of War).

(Cape High Ct.), *rev'd as moot*, 1999 (11) BCLR 1219 (CC).[4] On the other hand, when confronted with a constitutional challenge to its military justice system, the High Court of Australia considered but declined to follow *Généreux* in the course of holding that Australian general courts-martial are sufficiently independent. *Re Tyler; Ex parte Foley*, (1994) 181 CLR 18.

This body of foreign case law is significant in several respects. The decisions—and their distinct results—point to the issue's importance, complexity and persistence. In contrast, the Court of Appeals for the Armed Forces sought to resolve challenges to Article 25(d)(2)'s constitutionality in capital cases with a single paragraph in petitioner's case and a single paragraph in *United States v. Loving*. Pet. 131a-32a; 41 M.J. 213, 297 (1994), *aff'd on other grounds*, 517 U.S. 748 (1996). The issue merits deeper analysis.

Considering Article 25(d)(2)'s constitutionality will also allow the Court to revisit an important jurisprudential dispute: the proper role of foreign law in constitutional adjudication. Since the Court declared "comparative analysis inappropriate to the task of interpreting a constitution," *Printz v. United States*, 521 U.S. 898, 921 n.11 (1997), a substantial body of commentary has emerged on the subject,[5] including some by

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[4] The Constitutional Court held that new military justice legislation had rendered the case moot. *President, Ordinary Court Martial v. Freedom of Expression Inst.*, 1999 (11) BCLR 1219 (CC). Under § 20 of that legislation, military assessors are appointed not by the commanding officer, but by the director of military judges or an officer appointed by the director, from a list maintained by the local representative of the Adjutant General. Military Discipline Supplementary Measures Act, No. 16 of 1999 (S. Afr.) (cited in Fidell, *supra* note 3, at 196 n.5).

[5] Some academic commentary advocates comparative analysis as a tool of constitutional interpretation. *E.g.*, Vicki C. Jackson, *Ambivalent Resistance and Comparative Constitutionalism: Opening Up the Conversation on "Proportionality," Rights and Federalism*, 1 U. Pa. J. Const. L. 583 (1999); Mark Tushnet, *The Possibilities of*

members of the Court.[6]

II

THIS CASE PRESENTS THE OPTIMAL VEHICLE FOR ADJUDICATING THE CONSTITUTIONALITY OF ARTICLE 25(d)(2)

The issue of Article 25(d)(2)'s constitutionality is unlikely to percolate further in the lower courts. The Court of Appeals for the Armed Forces has disposed of it twice in opinions that offer little analysis. Pet. 131a-32a; *Loving*, 41 M.J. at 297. Nor will the issue be further developed on federal habeas review of a military death sentence. Because all military death row inmates are housed at the United States Disciplinary Barracks at Fort Leavenworth, Kansas, habeas review will be conducted under the Tenth Circuit's standard of review for collateral challenges to courts-martial. *See* Paul H. Turney, *New Developments in Military Capital Litigation: Four Cases*

Comparative Constitutional Law, 108 Yale L.J. 1225 (1999); Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 Ind. L.J. 819 (1999). Other commentary opposes the practice or urges caution in its use. *E.g.*, Seth F. Kreimer, *Commentary: Invidious Comparisons: Some Cautionary Remarks on the Process of Constitutional Borrowing*, 1 U. Pa. J. Const. L. 640 (1999); Alexander Somek, *The Deadweight of Formulae: What Might Have Been the Second Germanization of American Equal Protection Review*, 1 U. Pa. J. Const. L. 284 (1998).

[6] Stephen Breyer, *Constitutionalism, Privatization, and Globalization: Changing Relationships Among European Constitutional Courts*, 21 Cardozo L. Rev. 1045, 1060-61 (2000); Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, 54 Rec. of Ass'n of B. of City of N.Y. 278 (1999) ("comparative analysis emphatically *is* relevant to the task of interpreting constitutions and enforcing human rights") (emphasis in original), *reprinted in* 21 Cardozo L. Rev. 253 (1999); Sandra Day O'Connor, *Broadening Our Horizons: Why American Lawyers Must Learn About Foreign Law*, 45 Fed. L., Sept. 1998, at 20.

Highlight the Fundamentals, Army L., May 2000, at 103, 104 n.16. Under Tenth Circuit case law, federal habeas review will not reach the merits of an issue that was "given full and fair consideration by the military courts." *Lips v. Commandant, U.S. Disciplinary Barracks*, 997 F.2d 808 (10th Cir. 1993), *cert. denied*, 510 U.S. 1091 (1994). An issue that was raised before a military court is deemed "fully and fairly considered" even if that court rejected the claim without explanation. *Id.* at 812 n.2. Thus, absent review by this Court, the Court of Appeals for the Armed Forces' perfunctory resolution of Article 25(d)(2)'s constitutionality in capital cases will likely be the final word.

Despite the limited *judicial* consideration of Article 25(d)(2)'s constitutionality, the issue has been analyzed thoroughly. Numerous commentators have scrutinized the proper method of member selection.[7] Pursuant to a congressional directive, *see* Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, § 552, 112 Stat. 1920, 2023 (1998), in 1999 the Department of Defense issued a report recommending retention of the status quo. Dep't of Defense, Joint Service Comm. on Mil. Just., *Report on the Method of Selection of Members of the Armed Forces to Serve on Courts-Martial*

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[7] *See, e.g.*, James A. Young, III, *Revising the Court Member Selection Process*, 163 Mil. L. Rev. 1 (2000); Comment, *Reforming Court-Martial Panel Selection: Why Change Makes Sense for Military Commanders and Military Justice*, 7 Geo. Mason L. Rev. 1013 (1999); Guy P. Glazier, *He Called for His Pipe, and He Called for His Bowl, and He Called for His Members Three—Selection of Military Juries by the Sovereign: Impediment to Military Justice*, 157 Mil. L. Rev. 1 (1998); John S. Cooke, *The Twenty-Sixth Annual Kenneth J. Hodson Lecture: Manual for Courts-Martial 20X*, 156 Mil. L. Rev. 1, 25 (1998); Stephen A. Lamb, *The Court-Martial Panel Selection Process: A Critical Analysis*, 137 Mil. L. Rev. 103 (1992); David A. Schlueter, *The Twentieth Annual Kenneth J. Hodson Lecture: Military Justice for the 1990's—A Legal System Looking for Respect*, 133 Mil. L. Rev. 1, 19-20 (1991); Kenneth J. Hodson, *The Manual for Courts-Martial 1984*, 57 Mil. L. Rev. 1 (1972); Joseph Remcho, *Military Juries: Constitutional Analysis and the Need for Reform*, 47 Ind. L.J. 193 (1972).

(Aug. 19, 1999). That recommendation conflicts with a previous Department of Defense analysis, which concluded that "the convening authority should play no part in the selection process," and that a system of random selection should be adopted. Dep't of Defense, *Report of the Task Force on the Administration of Military Justice in the Armed Forces* 90 (1972) (quoted in Gary C. Smallridge, *The Military Jury Selection Reform Movement*, 19 A.F. L. Rev. 343, 351 (1978)). Thus, the question comes to the Court as thoroughly developed as it is likely ever to be.

The narrow scope of habeas review for court-martial convictions, *see Burns v. Wilson*, 346 U.S. 137 (1953), further supports a grant of certiorari. If a military death sentence were to reach this Court on appeal from a denial of habeas, the standard of review may not allow consideration of the merits of the petitioner's claims. The Court should therefore grant certiorari to ensure the issue's full consideration on direct review.

Finally, that this is a capital case makes it an especially appropriate vehicle for determining Article 25(d)(2)'s constitutionality. Resolution of this issue could, of course, affect capital and non-capital courts-martial alike. After all, *Généreux* and *Findlay* were both non-capital cases. But the Court may well hold that Article 25(d)(2) offends the Eighth Amendment's heightened reliability requirement for capital cases, *see Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion), and reserve for another day its constitutionality in non-capital cases. *Cf. Loving v. United States*, 517 U.S. 748, 774 (1996) (Stevens, J., concurring) (reserving application of *Solorio v. United States*, 483 U.S. 435 (1987), to capital cases). Such a holding would immediately affect only six cases. *See* Turney, *supra*, at 104. At the same time, it would provide guidance concerning the Court's view of Article 25(d)(2), thereby affording Congress and the President an opportunity to correct any constitutional defects before the Court is called upon to consider the issue in a non-capital case that could affect a far larger number of courts-martial.

CONCLUSION

For the foregoing reasons, certiorari should be granted as to the second question presented.

Respectfully submitted,

EUGENE R. FIDELL
(Counsel of Record)
FELDESMAN, TUCKER, LEIFER,
FIDELL & BANK LLP
2001 L St., N.W., 2d Floor
Washington, DC 20036
(202) 466-8960

STEPHEN A. SALTZBURG
720 20th Street, N.W.
Washington, DC 20052
(202) 994-7089

KEVIN J. BARRY
13406 Sand Rock Court
Chantilly, VA 20151
(703) 968-7247

PHILIP D. CAVE
515 King St., Ste. 420
Alexandria, VA 22314
(703) 549-6075

Attorneys for National Institute of Military Justice

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No. 00-607

In The
SUPREME COURT OF THE UNITED STATES

October Term, 2000

RONALD A. GRAY,
Specialist Four, United States Army,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Armed Forces

BRIEF OF NAVY-MARINE CORPS APPELLATE DEFENSE DIVISION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

GLENN GERDING
Lieutenant, JAGC
U.S. Naval Reserve
Navy-Marine Corps
Appellate Defense Division
716 Sicard St., S.E.
Washington, DC 20374
(202) 433-4161

DWIGHT H. SULLIVAN
Lieutenant Colonel
U.S. Marine Corps Reserve
Counsel of Record
RICHARD W. BAGLEY JR.
Commander, JAGC
U.S. Navy
Navy-Marine Corps
Appellate Defense Division
716 Sicard St., S.E.
Washington, DC 20374
(202) 433-4161
Counsel for Amicus Curiae

10pp

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INTEREST OF THE *AMICUS CURIAE*

The Navy-Marine Corps Appellate Defense Division represents Sailors and Marines on appellate review of court-martial convictions.[1] Among the Division's clients are the three Marines who are currently sentenced to death.

SUMMARY OF THE ARGUMENT

The two most significant defects in the military death penalty system are the method of selecting and size of court-martial panels, which are the functional equivalent of juries. Granting certiorari will allow the Court to determine whether these defects render the military capital punishment system too unfair and unreliable to satisfy service members' constitutional rights.

ARGUMENT

BECAUSE CAPITAL COURTS-MARTIAL MUST BE TRIED BEFORE MEMBERS, DEFECTS CONCERNING PANEL SIZE AND THE MEMBER SELECTION PROCESS POSE ENORMOUS DANGER TO THE MILITARY DEATH PENALTY'S FAIRNESS AND RELIABILITY.

Systemic defects concerning court-martial panel size and member selection are particularly significant in capital cases. Unlike defendants in non-capital courts-martial, capital defendants may not elect trial by military judge alone. Uniform Code of

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[1] Both parties consented to the filing of this brief. No counsel for a party authored this brief in whole or in part. The United States Government bore the sole financial cost of preparing this brief. No one else made a monetary contribution to the preparation or submission of this brief.

Military Justice (UCMJ) art. 18, 10 U.S.C. § 818 (1994). The Court of Appeals for the Armed Forces has rejected constitutional challenges to this statutory provision. *See, e.g., United States v. Loving*, 41 M.J. 213, 291 (1994), *aff'd on other grounds*, 517 U.S. 748 (1996). Thus, military capital defendants cannot have their verdict and sentence determined by independent military judges. *See Weiss v. United States*, 510 U.S. 163, 179-81 (1994). Instead, their lives rest in the hands of variably-sized panels handpicked from among the subordinates of the very person who chose to prosecute them and to seek the death penalty.

A. THE MILITARY JUSTICE SYSTEM'S DEPARTURE FROM THE UNIVERSAL CIVILIAN PRACTICE OF TWELVE-MEMBER CAPITAL JURIES WARRANTS REVIEW.

Despite the uniform civilian practice to the contrary, capital courts-martial can be, and often are, tried before panels with fewer than twelve members. Incredibly, a five-member panel can impose a death sentence even though a five-member civilian jury would be unconstitutional in any trial that could result in more than six months' confinement. *See Ballew v. Georgia*, 435 U.S. 223 (1978); *Baldwin v. New York*, 399 U.S. 66 (1970).

Five-member courts-martial have not always been permissible. The 1775 Articles of War governing the Continental Army required that general courts-martial consist of thirteen officers. Articles of War of June 30, 1775, art. 33, 2 J. Cont. Cong. 111, 117 (1775). This requirement grew from the British Articles' requirement for thirteen members, a rule that dates "at least to 1666." Frederick Bernays Wiener, *American Military Law in the Light of the Mutiny Act's Tricentennial*, 126 Mil. L. Rev. 1, 8 (1989). Congress authorized courts-martial with as few as five members in 1786, after finding that some Army detachments had an insufficient number of officers to convene a thirteen-member court-martial. Articles of May 31, 1786, 30 J. Cont. Cong. 316 (1786). At that time, when only commissioned officers could serve as court-martial members, the entire Army contained fewer than forty officers. Richard Kohn, *Eagle and Sword* 70 (1975).

While five-member courts-martial were a necessity in 1786, they are not today. The authorized strength for Department of Defense active duty forces on September 30, 2000, was 1,385,432. Nat'l Def. Auth. Act for Fiscal Year 2000, Pub. L. No. 106-65, § 401, 113 Stat. 512, 585 (1999). Obtaining twelve court-martial members from among well more than one million active duty personnel, including approximately 200,000 commissioned officers,[2] would pose no burden on the American military.

Nor would holding that the Constitution requires twelve-member capital courts-martial invalidate any congressional statute. The UCMJ does not forbid twelve-member panels, but rather mandates panels with at least five members. UCMJ art. 16(a)(1)(A), 10 U.S.C. § 816(1)(A) (1994). Thus, Congress has no policy against twelve-member capital court-martial panels. If the current system were held to be constitutionally deficient, the defect could be cured consistently with the UCMJ.

A particularly disturbing aspect of the current court-martial size rules is the lack of a fixed number of members, whatever that fixed number may be. In the military justice system, a death sentence can result only if the members unanimously convict the defendant of a death-eligible offense, unanimously find the existence of a designated aggravating factor, unanimously conclude that the aggravating circumstances substantially outweigh the mitigating circumstances, and unanimously conclude that death is the appropriate punishment. *See United States v. Simoy*, 50 M.J. 1, 2 (1998). "[B]ecause of requirements for unanimous votes, any one member at any stage of the proceeding [can prevent] the death penalty from being imposed." *Id.* at 3. Thus, with a twelve-member court-martial, the prosecution must win forty-eight votes to obtain a death sentence. Where only six members sit on the panel, as in petitioner's case, the prosecution need win only twenty-four votes. The crucial impact of panel size is apparent.

The combination of the requirement for unanimity and the variable panel size creates an inherent bias for the prosecution in the impaneling process. Because smaller panels favor the government, the prosecution has an incentive to voir dire the

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[2] *See Uniformed Services Almanac* 2000 at 245 (2000).

members and exercise challenges vigorously. The defense, on the other hand, has an incentive not to engage in voir dire or challenges. This is akin to giving the wolves and the sheep an equal opportunity to reduce the number of shepherds. The system transforms the facially-neutral voir dire and challenge procedures into weapons wielded exclusively by the prosecution. Capital court-martial panels tilting toward the government are the inevitable result.

In addition to producing biased panels, the lack of a fixed number of members allows an arbitrary factor to influence who is sentenced to death. Common sense suggests that the number of members impaneled at the end of voir dire and challenges will vary directly with the number of members originally detailed to the court-martial. Yet convening authorities have no guidance concerning how many members to appoint to capital cases beyond the requirement that the final panel include at least five members. Thus, the likelihood of a military defendant being sentenced to death is impacted greatly by the convening authority's unconstrained discretion, the very definition of arbitrariness. Such a system cannot survive Eighth Amendment scrutiny.

B. TRYING A CAPITAL COURT-MARTIAL BEFORE MEMBERS HANDPICKED BY THE SAME COMMANDING GENERAL WHO CHOSE TO PROSECUTE THE CASE IS FUNDAMENTALLY UNFAIR TO MILITARY DEFENDANTS.

Allowing the defendant's commanding general to handpick the court-martial's members directly threatens the tribunal's fairness. In some military justice cases, convening authorities or their staffs have manipulated the selection process to stack the resulting panels. For example, in *United States v. Hilow*, 32 M.J. 439 (C.M.A. 1991), the convening authority's staff selected members based on whether they were perceived to support "a command policy of hard discipline." *Id.* at 441. In *United States v. Smith*, 27 M.J. 242 (C.M.A. 1988), the convening authority had a practice of detailing at least two female members in rape or sexual misconduct cases. In *Smith*, the command also asked a prosecutor

to suggest potential members. The prosecutor recommended three military police officers, one of whom was detailed to and sat on the court-martial panel. *Id.* at 247-48. Other examples of court-stacking abound. *See* Major Guy P. Glazier, *He Called for His Pipe, and He Called for His Bowl, and He Called for His Members Three–Selection of Military Juries by the Sovereign: Impediment to Military Justice*, 157 Mil. L. Rev. 1, 51-53 (1998).

The true extent of convening authorities' abuse of the member selection process to affect cases' outcomes will never be known because improper command influence "is difficult to see and harder to prove." *United States v. Haagenson*, 52 M.J. 34, 37 (1999) (Sullivan, J., concurring). Indeed, the egregious court-stacking in *United States v. Smith* "would never have been uncovered if the [convening authority's] legal clerk had not been taking a college course from the civilian defense counsel." 27 M.J. at 252 (Cox, J., concurring). Such a fortuity is unlikely to occur in many cases. A system so vulnerable to surreptitious manipulation is insufficiently fair and reliable to take a person's life.

CONCLUSION

The military justice system as a whole would benefit from the Court granting the petition. Currently, only six service members are under death sentences,[3] only four of whom were tried by panels of fewer than twelve members.[4] If the Court were to invalidate the current capital court-martial size or selection system, the number of cases requiring retrials would likely be smaller now than in the future. Resolving these issues now would

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[3] Major Paul H. Turney, *New Developments in Military Capital Litigation: Four Cases Highlight the Fundamentals*, Army L., May 2000, at 103, 104 [hereinafter *New Developments in Military Capital Litigation*].

[4] In *United States v. Kreutzer, appeal docketed*, No. ARMY 9601044 (A. Ct. Crim. App. Sept. 30, 1996), and *United States v. Quintanilla, appeal docketed*, No. 9801632 (N-M. Ct. Crim. App. Oct. 5, 1998), death sentences were imposed by twelve-member court-martial panels.

promote judicial economy. Additionally, the Court should evaluate the military death penalty's fundamental fairness before the military carries out its first execution since 1961. *See New Developments in Military Capital Litigation*, *supra* note 3, at 104 n.13.

Respectfully submitted,

DWIGHT H. SULLIVAN
Lieutenant Colonel
U.S. Marine Corps Reserve
Counsel of Record
RICHARD W. BAGLEY JR.
Commander, JAGC
U.S. Navy
GLENN GERDING
Lieutenant, JAGC
U.S. Naval Reserve
Navy-Marine Corps
Appellate Defense Division
716 Sicard St., S.E.
Washington, DC 20374
(202) 433-4161
Counsel for Amicus Curiae

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No. 00-607

In the Supreme Court of the United States

RONALD A. GRAY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

(CAPITAL CASE)

BRIEF FOR THE UNITED STATES IN OPPOSITION

BARBARA D. UNDERWOOD
Acting Solicitor General
Counsel of Record

JOHN C. KEENEY
Acting Assistant Attorney General

LISA SIMOTAS
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

DAVID L. HAYDEN
Colonel, USA

EDITH M. ROB
Lieutenant Colonel, USA

ANTHONY P. NICASTRO
Major, USA
Government Appellate Division
United States Army Legal Services Agency
Arlington, VA 22203

25pp

QUESTIONS PRESENTED

1. Whether a defendant may be sentenced to death by a court-martial panel of fewer than twelve persons.

2. Whether the convening authority's power to select subordinates to serve as court-martial members violates the Constitution.

3. Whether the military judge who conducted petitioner's voir dire complied with the procedural requirements of *Batson* v. *Kentucky*, 476 U.S. 79 (1986).

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In the Supreme Court of the United States

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

(CAPITAL CASE)

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces (Pet. App. 1a-161a) is reported at 51 M.J. 1. The opinions of the United States Army Court of Military Review (now the United States Army Court of Criminal Appeals) are reported at 37 M.J. 730 (Pet. App. 163a-207a) and 37 M.J. 751 (Pet. App. 208a-229a).

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on May 28, 1999. Petitions for reconsideration were denied on April 6, 2000 (Pet. App. 231a) and June 26, 2000 (Pet. App. 230a). The petition for a writ of certiorari was filed on

September 25, 2000 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1259(1).

STATEMENT

Following a general court-martial at Fort Bragg, North Carolina, petitioner, a member of the United States Army, was convicted of premeditated murder (two specifications), attempted murder, rape (three specifications), robbery (two specifications), forcible sodomy (two specifications), burglary, and larceny, in violation of Articles 118, 80, 120, 122, 125, 121, and 129 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 918, 880, 920, 922, 925, 921, and 929, respectively. Pet. App. 165a. The court-martial sentenced petitioner to death, a dishonorable discharge, total forfeitures, and reduction to Private E-1. *Id.* at 3a. The Commanding General of the 82d Airborne Division approved the sentence. *Ibid.* Petitioner's convictions and sentence were affirmed by the United States Army Court of Military Review, *id.* at 163a-207a, 208a-229a, and by the United States Court of Appeals for the Armed Forces, *id.* at 1a-161a.[1]

1. Petitioner was an Army Specialist stationed at Fort Bragg, North Carolina. On December 15, 1986, he abducted, raped, sodomized, and murdered Private

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[1] Before his court-martial, petitioner pleaded guilty and was convicted in North Carolina state court of several offenses unconnected to the court-martial charges, including two counts of second degree murder, two counts of first degree burglary, five counts of first degree rape, five counts of first degree sexual offense, attempted first degree rape, three counts of second degree kidnapping, two counts of robbery with a dangerous weapon, assault with a deadly weapon with intent to kill, and inflicting serious injury. Petitioner was sentenced to three consecutive and five concurrent terms of life imprisonment for those crimes. Pet. App. 165a n.1.

Laura Lee Vickery-Clay. On January 3, 1987, he raped and attempted to murder Private Mary Ann Lang Nameth. Three days later, on January 6, he raped, sodomized, robbed, and murdered civilian Kimberly Ann Ruggles. Pet. App. 169a-171a.

The court-martial evidence established the following facts: The first victim, Private Vickery-Clay, disappeared from Fort Bragg on December 15, 1986. On that date, two witnesses saw her at a local K-Mart with a man later identified as petitioner. Vickery-Clay's car, found the next morning a block from her home, appeared to have been driven through the woods, and the driver's seat was set back farther than needed for Vickery-Clay to drive. Three fingerprints that matched petitioner's prints were found on the hood of the car. On January 17, 1987, another soldier discovered Vickery-Clay's half-naked, decomposed body in the woods in Fort Bragg. She had been raped, sodomized, and shot in the neck, forehead, chest, and back of the head. She had also suffered blunt force trauma to various parts of her body. The murder weapon—a .22 caliber pistol that petitioner had stolen in November 1986—was found approximately 60 feet from Vickery-Clay's body. Pet. App. 170a-171a; Gov't C.A. Br. 6 & n.5, 7.

On January 3, 1987, petitioner entered the barracks room of Private Mary Ann Lang Nameth under the pretense that he needed to use the bathroom. Once in the room, petitioner grabbed Nameth, held a knife to her throat, and asked for her military field gear. Petitioner then tied Nameth's hands behind her back with the cord from a curling iron, removed her underclothing, and raped her. Petitioner then stabbed her repeatedly in the neck and side and threatened to return and kill her if she screamed. Nameth suffered a

lacerated trachea and a collapsed or punctured lung. When, shortly thereafter, petitioner's photograph appeared in the newspapers and on television following his arrest for another crime, Nameth identified him as her assailant. Pet. App. 171a; Gov't C.A. Br. 10-12.

In the evening of January 6, 1987, Kimberly Ann Ruggles, a local taxi driver, was dispatched to pick up a passenger named "Ron" at petitioner's address. In the early morning hours of January 7, military police officers on routine patrol discovered Ruggles' empty taxicab parked at the edge of some woods. Her nude body was discovered a short distance away. She had been raped, sodomized, beaten, and stabbed seven times. Ruggles' mouth was gagged with a cloth belt that matched a pair of black karate pants that other police officers had found in petitioner's possession just hours earlier. Petitioner's fingerprints were found on the interior door handle of Ruggles' taxi, and Ruggles' fingerprints were found on money in petitioner's possession. Petitioner's footprints were also found at the scene of the crime. Pet. App. 169a-170a; Gov't C.A. Br. 13-17.

2. Petitioner was tried by a general court-martial over which a military judge presided. During the selection of the court-martial members, the prosecution exercised its peremptory challenge against Major Quander, one of two African-Americans on the panel. R. 762. Defense counsel objected to the challenge under *Batson* v. *Kentucky*, 476 U.S. 79 (1986), and requested that government counsel state its reasons for the challenge. R. 762. The military judge stated that there was no evidence that the challenge was racially based, "other than the fact the man happens to be black," and noted that the defense itself had earlier sought to strike Major Quander for cause. R. 763.

Government counsel then asserted that the challenge was not based on race and offered to state the reasons for the peremptory challenge. The judge replied that no further explanation was necessary. *Ibid.* Defense counsel offered no further objection. R. 764.

At the next court session, government counsel requested and was granted leave to append to the record a written statement of the government's reasons for the peremptory challenge. R. 779. In that document, titled Memorandum for Record, government counsel averred that:

> The peremptory challenge against Major Quander was exercised because we believed his responses concerning the death penalty were equivocal. * * * When asked if he could vote for the death penalty he indicated that he "thought" he could. He also stated he had "problems" with the death penalty and the evidence would have to be "devastating" before he could vote for it. * * *
>
> Our impression of Major Quander was that he was indecisive and equivocal on the death penalty issue and that it was in the government's interest to challenge him. * * * Major Quander's race was of no consequence in the decision making process except that we considered not making the challenge to avoid any possibility of an appearance of exclusion on a racial basis.

Pet. App. 160a-161a.

Defense counsel did not object to the inclusion of the government's statement in the record, and when the military judge asked the defense if it had "[a]nything else?," defense counsel did not renew the *Batson* objection. R. 779.

A six-member court-martial was seated, and petitioner was convicted of two specifications of premeditated murder, attempted murder, three specifications of rape, two specifications of robbery, two specifications of forcible anal sodomy, larceny, and burglary. Pet. App. 165a. The court-martial sentenced petitioner to death, a dishonorable discharge, total forfeitures, and reduction to Private E-1. *Id.* at 3a. The convening authority approved the sentence. *Ibid.*

3. The United States Army Court of Military Review (now the United States Army Court of Criminal Appeals) affirmed. Pet. App. 163a-207a, 208a-229a. As relevant here, the court summarily rejected petitioner's claim that he was unconstitutionally sentenced to death by a court-martial panel of fewer than twelve members. *Id.* at 165a-166a & n.2, 222a-223a (citing *United States* v. *Curtis*, 32 M.J. 252 (C.M.A.), cert. denied, 502 U.S. 952 (1991)). The court also summarily rejected petitioner's claim that the Fifth, Sixth, and Eighth Amendments do not permit a convening authority to select military subordinates to serve as court-martial members in a capital trial. Pet. App. 213a.

Finally, the court rejected petitioner's claim that the military judge violated *Batson* by failing to require the government immediately to articulate a race-neutral reason for its peremptory challenge. The court agreed with petitioner that the military judge should have required an explanation at the time that the government made the challenge, but the court found it sufficient that government counsel introduced a written explanation at the next court session. Pet. App. 176a. The court concluded that the government's basis for the challenge—that the member's responses to questions concerning the death penalty were equivocal—was

race-neutral, and that "public confidence in the military justice system has not been undermined." *Ibid.*

4. The Court of Appeals for the Armed Forces (CAAF) also affirmed petitioner's convictions and sentence. See 10 U.S.C. 867(a)(1) (mandating review by the CAAF in any case involving a death sentence). As relevant here, the CAAF, relying on previous decisions, rejected petitioner's claim that his capital sentence was unconstitutional because the court-martial panel had fewer than 12 members. Pet. App. 103a (citing *United States* v. *Loving*, 41 M.J. 213, 287 (1994), affirmed, 517 U.S. 748 (1996), and *Curtis*, 32 M.J. at 267-268). The CAAF also summarily rejected petitioner's claim that his constitutional rights were violated because the convening authority personally selected the members of the court-martial. Pet. App. 131a-132a (citing *Weiss* v. *United States*, 510 U.S. 163 (1994); *Loving*, 41 M.J. at 297; *United States* v. *Graf*, 35 M.J. 450 (C.M.A. 1992), cert. denied, 510 U.S. 1085 (1994); and *United States* v. *Mabe*, 33 M.J. 200 (C.M.A. 1991)).

Finally, the CAAF found no reversible error in the military judge's handling of the *Batson* challenge. Pet. App. 63a-68a. The court noted that, at the time of petitioner's trial, the CAAF had not yet held that *Batson* applied to courts-martial or that the defense made out a prima facie case of discrimination by showing that a single peremptory challenge was lodged against a court-martial member of the same minority race as the accused. *Id.* at 65a. The CAAF reasoned, moreover, that, even if the military judge had erred in concluding that defense counsel had not made a prima facie case of racial discrimination requiring the government to proffer a race-neutral explanation for the strike, the judge shortly thereafter allowed the government to submit a written explanation. *Id.* at 65a-

66a. That explanation, the CAAF noted, "*i.e.*, Major Quander's indecisiveness on the death penalty as a punishment, is a well recognized race-neutral explanation for a peremptory challenge." *Id.* at 66a (citing cases). Finally, the CAAF concluded that the military judge had adequately performed the third step in the *Batson* inquiry. Although the CAAF noted that it would have been preferable for the military judge to state expressly that he did not find the government's explanation pretextual, the CAAF concluded that the judge's conduct in its entirety "constitute[d] an implied ruling on his part that trial counsel's explanation was genuine and that [petitioner's] *Batson* claim was without merit." *Id.* at 67a.

Two judges dissented from the disposition of petitioner's *Batson* claim. Pet. App. 145a-159a. The dissent concluded that the military judge erred by granting the peremptory challenge without requiring the government to provide a contemporaneous race-neutral explanation. *Id.* at 150a. In the dissent's view, the fact that the prosecutor filed a statement explaining the reasons for the strike, "after the military judge [had] refused to require compliance with *Batson*, [did] not remedy the error by the military judge." *Ibid.* The dissent further concluded that the judge failed to comply with his duty under the third step of the *Batson* inquiry to determine whether petitioner had established purposeful discrimination. *Id.* at 151a-152a.

ARGUMENT

1. a. Petitioner contends (Pet. 6-9) that the military sentencing procedures are unconstitutional because they allow a capital sentence to be imposed when, as was the case here, the court-martial panel consists of fewer than 12 members. See Art. 16(1)(A), UCMJ, 10

U.S.C. 816(1)(A) (general court-martial may consist of "a military judge and not less than five members"); see also Art. 52(b)(1), UCMJ, 10 U.S.C. 852(b)(1) (unanimity required when court-martial imposes sentence of death). This Court has previously declined to review that issue, see *Loving* v. *United States*, 515 U.S. 1191 (1995) (No. 94-1966), and this case does not warrant a different result.

As petitioner recognizes (Pet. 7), this Court has repeatedly held that the Jury Trial Clause of the Sixth Amendment does not apply to courts-martial. See, *e.g.*, *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 123 (1866); *Ex parte Quirin*, 317 U.S. 1, 40-41 (1942); *Whelchel* v. *McDonald*, 340 U.S. 122, 127 (1950); *Reid* v. *Covert*, 354 U.S. 1, 19 (1957) (plurality opinion); *O'Callahan* v. *Parker*, 395 U.S. 258, 261 (1969), overruled on other grounds by *Solorio* v. *United States*, 483 U.S. 435 (1987). The Fifth Amendment specifically exempts "cases arising in the land or naval forces" from the requirement of an indictment by a grand jury for serious crimes. By drafting the Fifth Amendment in that manner, "the framers of the Constitution, doubtless, meant to limit the right of trial by jury, in the sixth amendment, to those persons who were subject to indictment or presentment in the fifth." *Ex parte Milligan*, 71 U.S. (4 Wall.) at 123. As the Court explained in *Ex parte Quirin*, 317 U.S. at 39, neither Article III of the Constitution nor the Sixth Amendment requires a trial by jury in the military, because those provisions were intended "to preserve unimpaired trial by jury in all those cases in which it had been recognized by the common law * * *, but not to bring within the sweep of the guaranty those cases in which it was then well understood that a jury trial could not be demanded as of right." Accordingly, because

petitioner had no Sixth Amendment right to a trial by a petit jury, he also had no right to a court-martial panel composed of 12 persons.[2]

Petitioner's reliance (Pet. 8) on this Court's Eighth Amendment jurisprudence is also misplaced. The Eighth Amendment does not guarantee a defendant in a capital case (or in any other) the right to have the jury fix his punishment, even when a sentence requires specific findings of fact. See, *e.g.*, *Harris* v. *Alabama*, 513 U.S. 504, 509-510 (1995); *Walton* v. *Arizona*, 497 U.S. 639, 648 (1990); *Spaziano* v. *Florida*, 468 U.S. 447, 459 (1984). Thus, although petitioner is correct that this Court's cases reflect the need for a higher degree of reliability in capital cases, this Court has repeatedly rejected the claim that jury sentencing is an indispensable means of achieving that reliability.

In support of his argument, petitioner relies heavily (Pet. 6, 8-9) on the fact that many States and the federal government leave the capital sentencing decision to 12 jurors, rather than some fewer number. By petitioner's own tally (Pet. 7 n.3), however, nine of the 38 States that permit capital punishment leave the final decision to the trial judge, rather than to the jury. There is accordingly no societal consensus that imposition of a death sentence requires the unanimous decision of 12 individuals. In any event, the state experience in the civilian context does not bear on the proper sentencing

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[2] In any event, a six-member panel, which petitioner had, is sufficiently large to satisfy the Sixth Amendment's jury trial guaranty, when it is applicable. *Williams* v. *Florida*, 399 U.S. 78, 86-103 (1970). Indeed, petitioner does not claim that the panel was too small to find him guilty, but only to sentence him to death. The Sixth Amendment, however, does not require that sentencing be performed by a jury, even in a capital case. See, *e.g.*, *Hildwin* v. *Florida*, 490 U.S. 638, 640-641 (1989) (per curiam).

procedures for courts-martial. Cf. *Weiss*, 510 U.S. at 177 (the requirements of due process differ in the military and civilian contexts). In the military context, Congress's judgment as to the appropriate size of courts-martial is a reasonable one. The essential function of the military is "to fight or be ready to fight wars should the occasion arise." *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 17 (1955). When members of the armed forces are diverted from that function by the need to serve on a court-martial panel, "the basic fighting purpose of armies is not served." *Ibid.* Congress reasonably determined that the rights of servicemen are adequately protected by the court-martial process without the further diversion of resources that would be required to provide 12-member panels in each case.[3]

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[3] Moreover, as the CAAF has noted, defendants found guilty and sentenced to death by courts-martial enjoy safeguards not available to persons convicted and sentenced to death in civilian courts, including the convening authority's power to commute the sentence and the fact that "a Court of Military Review, composed of trained appellate military judges, must thoroughly review the law, the facts, and the appropriateness of the accused's sentence." *Curtis*, 32 M.J. at 268. Indeed, unlike civilian appellate courts, which review sufficiency claims under a deferential standard, *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979), military courts have required the prosecution independently to prove the defendant's guilt before a court of military review. A court of military review must independently review the record and be convinced of the correctness of the court-martial panel's findings, including its ultimate finding that the accused is guilty, before the findings may be upheld. See Art. 66(c), UCMJ, 10 U.S.C. 866(c); *United States* v. *Palenius*, 2 M.J. 86, 91 n.7 (C.M.A. 1977); see also *Ryder* v. *United States*, 515 U.S. 177, 187 (1995). Furthermore, in cases involving a sentence of death, the UCMJ mandates a second tier of review before the CAAF. See Art. 67(a)(1), UCMJ, 10 U.S.C. 867(a)(1). Finally, no death sentence can be carried out until it is approved by the President of the United States, who "may

b. For the first time in this Court, petitioner contends (Pet. 9-16) that the lack of a fixed number of panel members in capital courts-martial violates both the Due Process Clause and the Eighth Amendment. He argues that, because members stricken from the court-martial panel often are not replaced, each strike reduces the number of persons that the prosecution must convince of the accused's guilt; accordingly, petitioner argues, the accused "has little to no incentive" (Pet. 10) to engage in voir dire or to exercise challenges. Petitioner forfeited this claim by failing to raise it before any of the military courts. See, *e.g.*, *Glover* v. *United States*, 121 S. Ct. 696, 701 (2001) (this Court ordinarily does not decide questions neither raised nor decided below).

In any event, the claim lacks merit and does not warrant this Court's review. The Constitution authorizes Congress to "make Rules for the Government and Regulation of the land and naval Forces," Art. I, § 8, Cl. 14, and grants Congress "primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military." *Solorio*, 483 U.S. at 447. See also *Burns* v. *Wilson*, 346 U.S. 137, 140 (1953) (plurality opinion). Congress's judgment about the desirability of mandating a fixed panel size, like its judgment about the minimum number of members that may appropriately comprise a court-martial, is entitled to special deference. See *Weiss*, 510 U.S. at 177. "The constitution of courts-martial, like other matters relating to their organization and administration," is an issue particularly "appropriate for congressional action." *Whelchel*, 340 U.S. at 127. Moreover, the practices at

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commute, remit, or suspend the sentence, or any part thereof, as he sees fit." Art. 71(a), UCMJ, 10 U.S.C. 871(a).

issue have been carried forward from the earliest days of our nation. Cf. *Solorio*, 483 U.S. at 447.

Contrary to petitioner's assertion (Pet. 13), the doctrine of unconstitutional conditions is not implicated here. That "well-settled" doctrine provides only that "the government may not require a person to give up a constitutional right * * * in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the [right that is waived]." *Dolan* v. *City of Tigard*, 512 U.S. 374, 385 (1994). As petitioner acknowledges (Pet. 13), the military does not deny defendants the right to engage in voir dire or to exercise challenges; nor does the government actually exact anything from the accused who avails himself of those rights. To the extent that defense counsel must weigh the potential benefits of engaging in voir dire or exercising challenges against speculative detriment to the accused, that consideration is not meaningfully different from the many strategic decisions that both sides must make at numerous points in any criminal trial. See *Ohler* v. *United States*, 120 S. Ct. 1851, 1854 (2000) ("both the Government and the defendant in a criminal trial must make choices as the trial progresses"); accord, *e.g.*, *Jenkins* v. *Anderson*, 447 U.S. 231, 236 (1980); *Chaffin* v. *Stynchcombe*, 412 U.S. 17, 30-31 (1973).

There also is no merit to petitioner's claim (Pet. 14-16) that the absence of a fixed panel size in capital courts-martial violates the Eighth Amendment. Each court-martial, regardless of the number of members, discharges its duties pursuant to the laws and regulations set forth in the UCMJ and the Rules for Courts-Martial. Petitioner does not dispute that those governing rules provide courts-martial "with objective standards to guide, regularize, and make rationally

reviewable the process for imposing a sentence of death." *Woodson* v. *North Carolina*, 428 U.S. 280, 303 (1976).

The fact that military personnel have been sentenced to death by courts-martial of varying sizes (see Pet. 9 n.4) does not establish that the military's application of the death penalty is unreliable or arbitrary. The statistics cited by petitioner do not show that panel size actually "enters into any capital sentencing decisions or that [size] was a factor in [petitioner's] particular case." *McCleskey* v. *Kemp*, 481 U.S. 279, 308 (1987). Indeed, petitioner does not even allege that the frequency with which courts-martial sentence an accused to death correlates with the size of the panel. In any event, as this Court has noted, many "factors may influence the outcome of a trial and a defendant's ultimate sentence, even though they may be irrelevant to his actual guilt." *Id.* at 307 n.28. As in any system that includes a measure of sentencing discretion, "a defendant's ultimate sentence necessarily will vary according to the judgment of the sentencing authority." *Ibid.*

2. Petitioner further contends (Pet. 17-23) that the convening authority's power to select subordinates as court-martial members violates the Fifth and Eighth Amendments. That claim also lacks merit and does not warrant this Court's attention.

Congress has empowered the convening authority (usually the commanding officer) to select the members of a court-martial according to statutorily enumerated criteria that limit the convening authority's discretion.[4]

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[4] In relevant part, Art. 25(d)(2), UCMJ, 10 U.S.C. 825(d)(2), provides:

> When convening a court-martial, the convening authority shall detail as members thereof such members of the armed

Moreover, Congress was sensitive to the concerns raised by petitioner about improper influence, and it addressed those concerns thoroughly in Article 37 of the UCMJ. That Article provides that no convening authority nor any other commanding officer "may censure, reprimand, or admonish the court or any member * * * thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceeding." Art. 37(a), UCMJ, 10 U.S.C. 837(a). Any "attempt to coerce or, by any unauthorized means, influence the action of a court-martial" is also expressly forbidden. Art. 37(a), UCMJ, 10 U.S.C. 837(a). Although petitioner relies heavily on the convening authority's alleged control over each subordinate's career, Congress has expressly provided that, in preparing any report or document to be used in determining the assignments or advancement of a member of the armed forces, no military personnel may "consider or evaluate the performance of duty of any such member as a member of a court-martial." Art. 37(b), UCMJ, 10 U.S.C. 837(b). As this Court noted in *Weiss*, "[a]ny officer who 'knowingly and intentionally fails to enforce or comply' with Article 37 'shall be punished as a court-martial may direct.'" *Weiss*, 510 U.S. at 180 (quoting Art. 98, UCMJ, 10 U.S.C. 898).

This Court has often noted that "Congress has 'plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline.'" *Weiss*, 510 U.S. at 177 (quoting

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forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament.

Chappell v. *Wallace*, 462 U.S. 296, 301 (1983)). The statutory provisions at issue here reflect the care with which Congress has approached its "delicate task of balancing the rights of servicemen against the needs of the military." *Solorio*, 483 U.S. at 447-448. Congress's judgment on the question of how court-martial members shall be selected is entitled to "particular deference." *Weiss*, 510 U.S. at 177 (quoting *Middendorf* v. *Henry*, 425 U.S. 25, 43 (1976)). Petitioner has not shown that the members of his panel were biased or that the appearance of bias is "so extraordinarily weighty as to overcome the balance struck by Congress." *Middendorf*, 425 U.S. at 44.[5]

Review by this Court of the selection issue is particularly unwarranted because there is a possibility that Congress may alter the present method of selecting court-martial members. As petitioner himself notes (Pet. 21), in the Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Congress ordered the Secretary of Defense to submit "a report on the method of selection of members of the Armed Forces to serve on courts-martial." Pub. L. No. 105-261, § 552(a), 112 Stat. 2023. As Congress directed, the report that the Secretary has submitted "examine[s] alternatives, including random selection, to the

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[5] In *Weiss*, this Court rejected the contention that the absence of fixed terms of service for military judges violated the Due Process Clause. The Court declined "to assume that a military judge who does not have a fixed term of office lacks the independence necessary to ensure impartiality." 510 U.S. at 178. Relying in part on Article 37 of the UCMJ, the Court concluded that "the applicable provisions of the UCMJ, and corresponding regulations, by insulating military judges from the effects of command influence, sufficiently preserve judicial impartiality so as to satisfy the Due Process Clause." *Id.* at 179.

current system of selection of members of courts-martial by the convening authority," and evaluates each such alternative. § 552(b), 112 Stat. 2023. Although the report does not recommend a change in the current selection system, Congress's directive indicates that Congress is considering whether a change is appropriate. Because congressional action could moot the question presented here, this Court's review of that question is not appropriate at this time.

3. Petitioner last contends (Pet. 23-28) that the military judge "failed to perform his duty" (Pet. 23) under *Batson* to require the government to provide a race-neutral explanation for its peremptory challenge and to determine whether the government's explanation was pretextual. Both military appellate courts correctly concluded that there was no *Batson* violation in this case, and petitioner's fact-bound claim to the contrary does not warrant further review.

In *Batson*, this Court held that a prosecutor may not use a peremptory challenge to exclude from the venire a member of a cognizable racial group on the basis of that person's race. *Batson*, 476 U.S. at 89. If the defendant makes a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the juror or jurors in question. The trial judge must then determine whether the defendant has carried his burden of proving purposeful discrimination. *Id.* at 96-98. The Court in *Batson* "decline[d], however, to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges." *Id.* at 99; see also *id.* at 99-100 n.24 ("[W]e make no attempt to instruct [state and federal trial] courts how best to implement our holding today.").

In this case, the government used its peremptory challenge to strike one of two African-American court members. Following defense counsel's objection, the military judge apparently concluded that defense counsel had failed to establish a prima facie case under *Batson*, and declined to require government counsel to state its reasons for the challenge.[6] Nonetheless, at the very next court session, the military judge granted the prosecutor's request to append to the record a written statement of the prosecutor's reasons for the challenge.[7] Although not immediately contemporaneous, the government's explanation was submitted to the military judge at the next possible opportunity—just three days later. There is no reason to believe that this brief lapse of time compromised the military judge's ability to evaluate the candor of the prosecution's explanation. See, *e.g.*, *Hernandez* v. *New York*, 500 U.S. 352, 365 (1991) (plurality opinion) ("evaluation of the prosecutor's state of mind based on demeanor and credibility lies 'peculiarly within a trial judge's province'") (quoting *Wainwright* v. *Witt*, 469 U.S. 412, 428 (1985)). Petitioner has cited no legal authority either before the CAAF (see Pet. App. 64a) or in this Court for his assertion that the government's explanation for the strike is fatally untimely. Compare *Turner* v. *Marshall*, 121 F.3d 1248, 1251 (9th Cir. 1997) (prosecutor gave no contemporaneous explanation for strikes;

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[6] The judge said that he found no evidence that the challenge was racially based, noting that the defense itself had earlier challenged the same member for cause on the basis of rumors the member had heard and articles he had read. R. 763.

[7] As the CAAF noted (Pet. App. 65a), even if the military judge erred in concluding that a prima facie case had not been established, that error was rendered moot by the government's subsequent proffer of a written explanation for the strike.

Batson hearing conducted six years after voir dire), cert. denied, 522 U.S. 1153 (1998); *Holder* v. *Welborn*, 60 F.3d 383, 388 (7th Cir. 1995) (prosecutor gave no contemporaneous explanation for strikes; *Batson* hearing conducted eight years after voir dire). Accordingly, there is no reason for this Court to review the conclusion—reached by both military appellate courts—that, in the circumstances of this case, the government's race-neutral explanation complied with *Batson*.

Moreover, legal developments since petitioner's court-martial make it unlikely that the facts presented here will recur. In *United States* v. *Moore*, 28 M.J. 366, 368 (C.M.A. 1989), the CAAF "adopt[ed] a *per se* rule" of procedure, applicable to all of the armed services, for handling *Batson* claims. Because counsel at courts-martial are entitled only to one peremptory challenge, it is difficult to establish a pattern of discriminatory strikes. The CAAF in *Moore* therefore held that the exercise of that single challenge against a member of a cognizable racial group constitutes a prima facie case of discrimination under *Batson*. *Id.* at 368. Thus, it has been the rule at all military courts-martial since 1989 that "every peremptory challenge by the Government of a member of the accused's race, upon objection, must be explained by trial counsel." *Ibid.* Petitioner does not contend that military judges have been unable or unwilling to adhere to *Moore;* nor does he cite any case since *Moore* in which a military judge has allowed the government to provide its race-neutral explanation other than immediately following a *Batson* challenge. Therefore, the question petitioner asks this Court to resolve is of no continuing importance.

The CAAF also did not err in concluding that the military judge implicitly ruled that the government's

race-neutral explanation for the strike was credible.[8] Pet. App. 66a-67a. After the government provided its explanation, defense counsel did not review the *Batson* objection. The military judge inquired whether defense counsel had "[a]nything else" to say in response to the explanation, and defense counsel did not. R. 779. The CAAF correctly examined the statements and conduct of the military judge in their entirety and concluded that they reflected an implied ruling that the government's explanation was genuine and that petitioner's *Batson* claim lacked merit. See *ibid.* That case-specific conclusion does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

BARBARA D. UNDERWOOD
Acting Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
LISA SIMOTAS
Attorney

DAVID L. HAYDEN
Colonel, USA
EDITH M. ROB
Lieutenant Colonel, USA
ANTHONY P. NICASTRO
Major, USA
Government Appellate Division
United States Army Legal Services Agency

FEBRUARY 2001

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[8] Petitioner did not raise that contention before the CAAF. See Def. C.A. Br. 177-188. The panel majority addressed the issue only because the dissent chose, *sua sponte*, to raise it. See Pet. App. 64a.

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No. 00-607
[Capital Case]

In The
Supreme Court of the United States

RONALD A. GRAY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

Donald G. Rehkopf, Jr.
Counsel of Record
BRENNA & BRENNA
31 East Main Street, Suite 2000
Rochester, New York 14614
(716) 454-2000

Attorneys for National Association of Criminal Defense Lawyers

11 Centre Park
Rochester, New York 14614
(716) 232-6920

(4139)
THE DAILY RECORD

107 Delaware Avenue — Suite 81
Buffalo, New York 14202
(716) 847-2904

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INTEREST OF THE *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers ["NACDL"] is a non-profit corporation with a subscribed membership of more than 10,000 national members, including military defense counsel, and an additional 28,000 state, local and international affiliate members.[1] The American Bar Association recognizes the NACDL as one of its affiliate organizations and awards it full representation in its House of Delegates.

The NACDL was founded in 1958 to promote study and research in the field of criminal law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence and expertise of defense lawyers in criminal cases, both civilian and military. Among the NACDL's objectives are ensuring justice and due process for persons accused of crime, promoting the proper and fair administration of criminal justice and preserving, protecting and defending the adversary system and the U.S. Constitution.

The NACDL's interest in this case is two-fold.[2] First, it is a *peace time* death penalty case involving fundamental Constitutional questions and issues under the Bill of Rights and their application to America's servicemen and women. Second, the proper and fair administration of military justice under the Uniform Code of Military Justice ["UCMJ"] which impacts upon these fundamental Constitutional rights, requires that this Court be the final arbiter of what process is due to our uniformed service members, particularly in a capital case and to insure "Equal Justice Under Law."

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[1]No counsel for a party authored this Brief in whole or in part. No person, entity or organization other than the *amicus curiae* made a monetary contribution to the preparation and submission of this brief or to counsel for the NACDL.

[2]Counsel for the Parties have consented to the NACDL filing this Brief and these consents are on file with the Clerk.

STATEMENT OF FACTS

The NACDL accepts Petitioner's "Statement of Facts." We note additional relevant and undisputed factual matters in the record which support the granting of *certiorari* and relief for Petitioner. The Convening Authority[3] originally detailed a panel of fifteen prospective court members [R. 1a-2]. This was done based upon the specific, legal advice of the Convening Authority's official lawyer, his Staff Judge Advocate ["SJA"] [R. Appellate Exhibit LIX] [4] After *voir dire* and the challenge process,[5] only six members remained on the panel. The Defense then moved "as a matter of equal protection and due process, to require that there be a panel of twelve persons and to delay this proceeding (*sic*) the appointment - or the detailing of enough members to get up to twelve." [R. 768-69].

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[3]In military jurisprudence, the Commander who "convenes" the court-martial, is referred to as the "Convening Authority." In a General Court-Martial, such as Petitioner's, the Convening Authority also decides as applicable whether or not to "refer" the case as capital or non-capital, and selects the panel of prospective members under the UCMJ. *See* Articles 16, 18, 22 and 34 UCMJ, 10 U.S.C. §§ 816, 818, 822 and 834.

[4]Article 34, UCMJ, 10 U.S.C. § 834, mandates a "Pre-Trial Advice," which this exhibit supplemented. Thus, *both* the Convening Authority and his counsel, believed that detailing a panel of fifteen members was appropriate in this capital case. Article 16(1)(A), UCMJ, 10 U.S.C. § 816(1)(A), while setting a ***minimum*** number of members to constitute a generic quorum for general courts-martial at five members, sets no ***maximum*** number of members leaving that to the discretion of the Convening Authority. Rule 501(a)(1)(A), Rules for Courts Martial ["RCM"], contained in the *Manual for Courts-Martial* ["MCM"], an Executive Order promulgated pursuant to Article 36, UCMJ, 10 U.S.C. § 836, requires that a general court-martial contain "***not less than*** five members." [Emphasis added].

[5]Article 41, UCMJ, 10 U.S.C. § 841.

The Military Judge[6] in response noted:

> That may be a point that, in the future, is well-founded if the Congress thought - perhaps the Supreme Court itself, in their infinite wisdom, decided that's the way it should be, and I applaud you for recording for posterity . . . . The law, as it exists under the military system, which is a system unto itself which the Congress has elected to enact and which the Congress - no, it was the Supreme Court - thus far at least have blessed, is to the effect that the minimum requirement is five officers - is five members. We have six and we meet the criteria. [R. 769]

The prosecution[7] opposed the motion, stating, "We agree with the court in this case." [R. 769]. The following exchange then took place:

> MJ: Well, I interrupted my thought merely because ***if the government were to be of the mind that they wanted to have twelve members, I certainly wouldn't contest it.*** [emphasis added]
>
> TC: We are not, Your Honor.
>
> MJ: All right. Based upon the rationalization advanced previously, the motion for requirement of at least twelve members is denied. [R. 770].

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[6]Customarily and historically, the trial judge in a court-martial is referred to as the "Military Judge," abbreviated in the record as "MJ."

[7]In military parlance a prosecutor is the "Trial Counsel," or "TC."

SUMMARY OF ARGUMENTS

The Petitioner was sentenced to death by a six person, military jury. The NACDL submits that a member of the United States military who is prosecuted in peacetime for a capital offense, is entitled to the same measure of constitutional due process as any other citizen prosecuted by the United States, *viz.* a twelve person panel. Since neither the Uniform Code of Military Justice,[8] nor the *Manual for Courts-Martial*,[9] specifically addresses the size or number of members necessary in a peacetime, capital case,[10] one must look to both the historical practice and constitutional jurisprudence to ascertain what process is due. Congress delegated this authority to the President[11] who, while promulgating Rule 1004, RCM, discussing capital cases, did not address the number of members issue. The U.S. Court of Appeals for the Armed Forces in *United States v. Matthews,* 16 M.J. 354 (C.M.A. 1983),[12] concluded that at least for peacetime military capital cases, that military sentencing procedures must comport with civilian constitutional standards.

Here the Convening Authority upon the advice of his lawyer, detailed fifteen members to Gray's court-martial. But, when the panel's size was reduced to six members after challenges, the defense moved to "delay this proceeding" to allow additional members detailed so as to have a jury of twelve. It was arbitrary, capricious and constitutionally erroneous for

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[8]10 U.S.C. § 801, *et seq.*

[9]Promulgated by the President as Commander-in-Chief.

[10]*See* footnote 5, *supra.*

[11]Article 36(a), UCMJ, 10 U.S.C. § 836(a).

[12]That Court was previously called "The Court of Military Appeals."

the military judge to have deferred to the Prosecutor, the very person seeking death, on this fundamental issue. Since Congress gave the Convening Authority the exclusive authority to select and detail court members,[13] the military judge's error was compounded by his refusal to seek the Convening Authority's input.

ARGUMENT IN SUPPORT OF PETITIONER FOR GRANTING *CERTIORARI*

I. A CITIZEN-SOLDIER TRIED BY GENERAL COURT-MARTIAL IN PEACETIME IN THE UNITED STATES, IS ENTITLED TO THE SAME MEASURE OF CONSTITUTIONAL DUE PROCESS AS ANY OTHER CITIZEN, BEFORE BEING SUBJECTED TO A DEATH SENTENCE.

> The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances.[14]

Ronald Gray, the Petitioner, was a Soldier in the United States Army at the time that he was sentenced to death by a six person general court-martial panel at Ft. Bragg, North Carolina

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[13] *See* Article 25(d)(2), UCMJ, 10 U.S.C. § 825(d)(2), which provides in relevant part:

> "When convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament."

[14] *Ex Parte Milligan*, 71 U.S. 2, at 120-21 (1866). *Milligan* involved an application of "martial" law, as opposed to pure "military" law, a distinction discussed in its concurring opinion at 141-42.

on April 12, 1988. In peacetime at least, it has long been recognized that with the exception of the Grand Jury Clause, the Fifth Amendment's due process guarantees apply to members of our Armed Forces being court-martialed. One early military commentator, Captain William DeHart, in his treatise first published in 1846, titled, *Observations on Military Law and the Constitution and Practices of Courts Martial* (1859 ed. Wiley & Hall, NYC; reprinted at 18 *Classics in Legal History*, 1973, Wm. S. Hein & Co., Buffalo, NY) [hereinafter, "DeHart"], notes that with the exception of the Grand Jury clause:

> [M]ilitary courts take cognizance of such matters as justly fall within their competency, and proceed against offenders, according to the language of the constitution, by "due process of law," which terms applied, in reference to this subject, are convertible with those of, *by the law of the land.* (emphasis in original; citing Kent's *Commentaries*, vol ii, page 10).

See also, G. Henderson, *Courts-Martial and the Constitution: The Original Understanding,* 71 Harv. L. Rev. 293 (1957) [Bill of Rights applies to military unless expressly excluded].

This Court in the context of a 14th Amendment, due process analysis traced the ancient history of the "law of the land" and its evolution into "due process of law." *Hurtado v. California,* 110 U.S. 516, at 522 *et seq.* (1884). *Hurtado* recognized that in evaluating due process issues, "that a process of law, which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and in this country. . . ." 110 U.S. at 528. Furthermore, there can be no question that service members "are entitled to the due process of law guaranteed by the Fifth Amendment." *Middendorf v. Henry,* 425 U.S. 25, at 43 (1976).

As the Court observed in *Weiss v. United States*, 510 U.S. 163, at 174 (1994), "By enacting the Uniform Code of Military Justice in 1950, and through subsequent statutory changes, Congress has gradually changed the system of military justice so that it has come to more closely resemble the civilian system."[15] *Amicus* does *not* suggest that the Fifth Amendment due process guarantees for military members must be applied in the same context as in civilian criminal prosecutions. Rather, we respectfully submit that in a peacetime capital trial by a general court-martial, to avoid offending the Eighth Amendment's proscription against the *arbitrary* imposition of the death penalty, that the process due, *i.e.*, a twelve person jury,[16] commands that a capital court-martial consist of twelve members. This analytical framework was provided in *Rostker v. Goldberg*, 453 U.S. 57, at 67 (1981), where this Court held:

> None of this is to say that Congress is free to disregard the Constitution when it acts in the area of military affairs. In that area, as any other, Congress remains subject to the limitations of the Due Process Clause. . . but the tests and limitations to be applied may differ because of the military context. [internal citations omitted].

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[15]*Cf.* Article 36(a), UCMJ, 10 U.S.C. § 836(a), which in delegating "Pretrial, trial, and post-trial procedures" in courts-martial to the President specifically suggests that the President "apply the principles of law . . . generally recognized in the trial of criminal cases in the United States district courts. . . ."

[16]We recognize that this Court has yet to interpret the Constitution as mandating a 12 person jury in a *capital* case. *Williams v. Florida*, 399 U.S. 78 (1970), was a *non-capital* case where the Florida statute at issue expressly stated , "Twelve men shall constitute a jury to try all capital cases. . . ." 399 U.S. at 80, fn. 3. *Compare, Thompson v. Utah*, 170 U.S. 343 (1898) [non-capital case decided on *ex post facto* grounds]. Of relevance to this issue is the fact that Article 45(b), UCMJ, 10 U.S.C. § 845(b), bars an Accused from entering a guilty plea in a capital case, while Article 18, UCMJ, 10 U.S.C. § 818, precludes on jurisdictional grounds an Accused from waiving members in a *capital* case. Thus, *Hurtado's, supra*, "settled usage" analysis of due process becomes critical in resolving this case.

See also, Weiss, supra, at 176.

This case has two fundamental constitutional elements. First, the plenary power of Congress under Article I, § 8, cl. 14, U.S. Const., "To make Rules for the Government and Regulation of the land and naval forces." The second is the President's status as Commander-in-Chief, Article II, § 2, cl. 1, U.S. Const., to include those military powers delegated by Congress. *See, e.g., Loving v. United States,* 517 U.S. 749, at 769 (1996). But, while Congress could have expressly legislated a *separate* number of members for a general court-martial in a capital case,[17] or while the President in promulgating the *Rules for Courts-Martial* could also have set such a number, they have *not* done so. Thus, there is no constitutional tension here between an act of Congress or a Presidential order and the Due Process clause. As such, the "balancing" test employed in *Middendorf, supra* at 44, and in *Weiss, supra* at 177-78, is inapplicable herein.

Justice Ginsburg, concurring in *Weiss,* notes that "men and women in the Armed Forces do not leave constitutional safeguards and judicial protection behind when they enter military service." 510 U.S. at 194.[18] That observation aptly reflects the holding in *United States v. Matthews,* 16 M.J. 354 (C.M.A. 1983). *Matthews* reversed a peacetime death sentence, finding that the military's procedures were constitutionally

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[17]As noted below, historically under various versions of the *Articles of War,* (including some that predated the Constitution), the number of members in a general court-martial was ***not less than*** 13.

[18]*See also, Loving, supra* at 774, where Justice Stevens notes, "when the punishment may be death, there are particular reasons to ensure that the men and women of the Armed Forces do not by reason of serving their country receive less protection than the Constitution provides for civilians." (Stevens, J., concurring). Justices Souter, Ginsburg and Breyer joined this opinion.

flawed under *Furman v. Georgia*, 408 U.S. 238 (1972). The *Matthews'* Court stated:

> [W]e see no reason why Matthews should be executed . . . if the sentencing procedures used by the court-martial failed to meet the standards established by the Supreme Court for sentencing in capital cases in civilian courts. *There is no military necessity for such a distinction*; and we do not believe that applying lower standards in this case would conform to the intent of Article 55[19] or of the Eighth Amendment. 16 M.J. at 369. [emphasis added].

The military's highest court revisited capital jurisprudence when it first considered *United States v. Curtis*, 32 M.J. 252 (C.M.A. 1991).[20] *Curtis* decided in *dicta* that military capital jurisprudence did not require a twelve person panel. 32 M.J. at 267.[21] The Court's opinion fails to state why (other than the obvious preservation issue) it rejected the twelve member argument, other than a generic holding that "RCM 1004. . . complies with due process requirements. . . ." 32 M.J. at 269.

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[19]Article 55, UCMJ, 10 U.S.C. § 855. This prohibits courts-martial from imposing "cruel and unusual punishment." Early in its existence, the then Court of Military Appeals held that in enacting Article 55, "Congress intended to confer as much protection as that afforded by the Eighth Amendment. Additionally . . . we believe that it intended to grant protection covering even wider limits." *United States v. Wappler*, 2 U.S.C.M.A. 393, 9 C.M.R. 23, at 26 (C.M.A. 1953), *see also*, Judge Fletcher's concurring opinion in *Matthews*, 16 M.J. at 383.

[20]*Curtis* has a lengthy appellate history. *See* 33 M.J. 101 (C.M.A. 1991) [*fur. rev.*; case remanded]; 44 M.J. 106 (1996) [*aff'd*]; 46 M.J. 129 (1997) [*recon. granted*; death sentence vacated and remanded]; and 52 M.J. 166 (1999) [life sentence affirmed].

[21]Then Chief Judge Sullivan's opinion notes that Curtis failed to object at trial to his 9 member panel, nor did he, as Gray has done here, request the detailing of additional members. 32 M.J. at 271 [Sullivan, C.J., concurring].

Finally, the record herein clearly shows that at trial, the Prosecution never advanced any "military necessity" argument or claimed any "manifest injury" would result if Gray's Motion for a twelve member panel were granted. [R. 768] Indeed, they could not, as the Convening Authority had detailed *fifteen* members to Gray's court-martial. As the record also shows, the final number of members, six, in Gray's case was simply the result of an *arbitrary* decision by the Prosecutor - not the Military Judge, and certainly not the Convening Authority.

A. The Fifth Amendment's Requirement That "Nor Shall Any Person. . . Be Deprived of Life . . . Without Due Process of Law. . . ," must Apply in Peacetime under the U.C.M.J. for a Capital Offense, and must Be Construed in Conjunction with the Article III, § 2, Cl. 3, U.S. Constitution, Requirement That "The Trial of All Crimes, [Except Impeachment] Shall Be by Jury. . . ."

While it may be a "historical accident"[22] that for *non-capital* cases, twelve person juries were the standard and therefore not a mandate of the Sixth Amendment, any analysis of *federal* (to include courts-martial) criminal procedure cannot ignore the plain language of Article III, § 2, cl. 3, of the Constitution, *i.e.*, that "The Trial of all Crimes . . . ***shall be*** by Jury. . . ." [emphasis added]. This mandatory language was "plainly understood during the ratification period as words of obligation."[23] Thus, pre-Constitutional history is relevant in

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[22]*Williams v. Florida*, 399 U.S. 78, at 102 (1970).

[23]A. Amar, *The Bill of Rights*, at 105 (1998) [hereinafter "Amar"], citing *The Federalist, No. 83*. There Hamilton states that with respect to criminal cases, this is an (continued..)

ascertaining what the Founding Fathers were referring to, especially in capital cases, as a "jury."

> [I]mbedded in the English consciousness of liberty under law was the idea of trial by jury. Mentioned as early as 1166 in connection with crimes (Assize of Clarendon), by 1342 the twelve-man English jury was a regular fixture.[24]

Professor Rutland goes on to note that by 1628, Charles I "had reluctantly agreed to the proposition that no freeman might lose his life . . . without due process of law. . . ." Rutland, at 6. Clearly this included the right to a trial by jury, a concept that was imported to the American colonies.[25]

Of relevance here, is this Court's recognition that it has only been relatively recently, that courts-martial have been authorized to try peacetime capital cases in the United States. *See, Loving, supra* at 752. Indeed, DeHart's treatise on Military Law quoted Hale's *Pleas of the Crown*, "one 'who hath a commission of martial authority doth in time of peace hang or otherwise execute any man by color of law, it is murder'" DeHart at 12. History clearly shows that prior to the ratification of the Constitution and the Bill of Rights, military courts-martial mandated "members" for both the guilt and sentencing stages, a "right" that the Framers were certainly cognizant of and which

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[23](...continued)
"express injunction of trial by jury ***in all such cases.*** R. Fairfield (ed.)," *The Federalist Papers*, at 257 (2nd ed., Doubleday Anchor, Garden City, NY, 1966).

[24]R. Rutland, *The Birth of the Bill of Rights, 1776-1791*, at 5 (Classics ed., Northeastern Univ. Press, 1983) [hereinafter, "Rutland"].

[25]Rutland notes that in 1676, the "fundamental laws" of West New Jersey required a "tryal . . . by twelve good and lawful men. . . ." and that in 1683, Pennsylvanians were tried by "a jury of twelve men." Rutland, at 18-20.

is consistent with the right to a jury trial mandated in criminal cases by Article III, § 2, cl. 3., U.S. Const.

The *Massachusetts Articles of War*, dated April 5, 1775, provided in Article 32, "No General Court Martial shall consist of a *less number than thirteen*. . . ."[26] The *American Articles of War*, dated June 30, 1775, provided in Article XXXIII, "No general court-martial shall consist of less number than thirteen. . . ." Winthrop, at 956. Repromulgated in 1776, the *American Articles of War*, in Section XIV, Art. 1, continued the not less than thirteen member requirement. Winthrop, at 967. This did not change until 1786, when the size of the "standing" Revolutionary Army had significantly decreased,[27] the *Articles of War* were now amended to read, "General courts-martial may consist of any number of commissioned officers from 5 to 13 inclusively; but they *shall not consist of less than 13, where that number can be convened without manifest injury to the service.*" Art. 1, Winthrop, at 972 [emphasis added].

When Congress enacted the *American Articles of War of 1806*, it continued in Article 64, the provision from 1786, mandating thirteen members absent a showing of "manifest injury to the service." Winthrop, at 981. Thus, it is clear that at the time of the ratification of the Constitution and the Bill of Rights, not only was the right to a jury trial secured in criminal cases, but military members subjected to trial by general courts-martial, were entitled to a thirteen member panel, absent a showing of "manifest injury to the service." Here as the Record demonstrates, the Prosecutor never made any such claim.

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[26]Reprinted in W. Winthrop, *Military Law and Precedents* (2nd ed., G.P.O. 1920; as reprinted in *The Legal Classics Library*, Gryphon Editions, Inc., 1988), at 950 [hereinafter, "Winthrop"].

[27]*See*, D. Sullivan, *Playing the Numbers: Court-Martial Panel Size and the Military Death Penalty*, 158 Mil. L. Rev. 1, at 5, footnotes 16 and 17 (1998) [hereinafter "Sullivan, *Numbers*"].

B. The Impact of Federal Death Penalty Legislation on Petitioner's Case.

Congress in enacting 18 U.S.C. § 3593(b), has expressly provided for a twelve person jury in federal capital cases.[28] While *Amicus* does not contend that this section is directly binding on capital courts-martial, it is highly probative to a proper analysis of Petitioner's due process issue. First, Congress has expressly directed the President to "apply the principles of law . . . recognized in the trial of criminal cases in the United States district courts. . . ."[29] Equally as important is the fact that by enacting § 3593, Congress has clearly expressed its intent as to what process is due a defendant facing a federal capital sentence, *i.e.*, a twelve person jury.

Neither the *Uniform Code of Military Justice* nor the *Manual for Courts-Martial* forbids or precludes a twelve person (or more) panel in a capital case. Thus, the Congressional intent expressed in Article 36(a), U.C.M.J., to look to federal practice, cannot be ignored. But as Gray's conviction and death sentence by a six person panel shows he has, as Justice Stevens noted in his concurrence in *Loving*, "received less protection" than a civilian prosecuted for the same crimes by the United States would have received, *viz.* a twelve person jury.

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[28]This section reads in relevant part, "A jury impaneled [herein] shall consist of 12 members, unless, at any time before the conclusion of the hearing, the parties stipulate, with the approval of the court, that it shall consist of a lesser number."

[29]Article 36(a), UCMJ, 10 U.S.C. § 836(a). *Amicus* acknowledges that this provision is permissive and hence, discretionary guidance, but it is clear evidence that Congress to the extent practicable, was looking to keep the military justice system on a constitutional par with other federal criminal jurisprudence. *See, Loving, supra* at 770 for a discussion of Article 36, UCMJ, in this regard.

C. The "Settled Usage" Rule Compels a Finding that in a Peacetime Capital Court-Martial, Due Process Requires a Twelve Person Panel.[30]

At least since 1342, in Britain,[31] and then later in the American colonies, the right to a jury meant the right to a twelve person panel. Additionally, American military jurisprudence from pre-Constitutional times until relatively recently has clearly expressed a preference for panels of thirteen members. Indeed, the U.S. Attorney General in an opinion in 1819, in a capital court-martial case noted not only this preference, but the distinction for peacetime offenses.[32] History, teaches *Weiss,*

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[30]As stated in *Hurtado, supra* at 528, "a process of law, which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and in this country. . . ."

[31]*See* text accompanying footnotes 24 and 25, above.

[32]This provides in relevant part:

> This being a case, however, of life and death ... that, by the 64th article of the Rules and Articles of War, it is required that general courts-martial shall not consist of less than thirteen, where that number can be convened without manifest injury to the service. . . . It is difficult to conceive an emergency in time of peace so pressing as to disable the general officer who orders the court from convening thirteen commissioned officers on a trial of life and death, *without manifest injury to the service.* And if a smaller number act, without such manifest emergency, I repeat that they are not a lawful court, and an execution under their sentence would be murder. With all the respect, therefore, which we ought to feel for our officers, I suggest to you, sir, as a matter of legal propriety, that, *in every case of life and death at least,* the President ought to be satisfied of the manifest injury which the service would have sustained in convening a court of *thirteen,* before he gives his sanction to a sentence of death by a smaller number. 1 Op. Atty Gen. 296, 1819 U.S. AG LEXIS 21, at *6-7 (1819)

Martin v. Mott, 25 U.S. 19, at 34-35 (1827), held that the decision "as to the number (continued...)

supra at 177-78, "is a factor that must be weighed" in evaluating due process.

This Court noted in *Williams, supra,* at 103, with respect to capital cases that since "no State provides for less than 12 jurors" that fact suggested "implicit recognition of the value of the larger body as a means of legitimating society's decision to impose the death penalty." Yet, in the thirty years since *Williams* was decided, *only* the military prosecutes capital cases with less than twelve jurors.[33] Due process comparatively and historically, if not constitutionally, requires that twelve jurors hear capital cases at least at the guilt phase. Finally, due process can never be satisfied when the *size* of a capital jury is dependant upon the caprice of the *prosecutor* seeking death.[34] Here, Petitioner was sentenced to death by six members. *Curtis* was sentenced to death by nine members,[35] a 50% larger panel, while Sergeants Kreutzer and Quintanilli "both had twelve member panels,"[36] *double* that of Petitioner herein! Such an arbitrary allotment as to life or death, respectfully should not be countenanced by this Court under any test of Due Process.

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[32](...continued)
which can be convened without manifest injury to the service," was a "matter submitted to [the] sound discretion" of the Convening Authority.

[33]Sullivan, *Numbers*, at 1.

[34]*Id.*, at 15-16.

[35]*Curtis*, 32 M.J. at 271 (Sullivan, C.J., concurring).

[36]Sullivan, *Numbers*, at 4, fn. 5. For an analysis of the *effect* the differing sizes have on capital cases, *see Id.*, at 34 *et seq.*

II. WHERE THE CONVENING AUTHORITY DETAILED FIFTEEN MEMBERS TO PETITIONER'S COURT-MARTIAL WITHOUT ANY OTHER LIMITATIONS OR RESTRICTIONS[37] AND AFTER THE INITIAL CHALLENGE PROCESS ONLY SIX MEMBERS REMAINED, IT WAS FUNDAMENTAL ERROR FOR THE MILITARY JUDGE TO HAVE DENIED PETITIONER'S MOTION TO ADD ADDITIONAL COURT MEMBERS WITHOUT SEEKING THE CONVENING AUTHORITY'S INPUT.

When Congress enacted Article 25(d)(2), U.C.M.J.,[38] it gave plenary authority and discretion to the Convening Authority to "detail" the members of a court-martial using the "best qualified" standard set out in the Article. That aspect of military law, constitutional or not, has been settled since the Court decided *Martin v. Mott, supra* in 1827. Here the Convening Authority detailed fifteen members and there is no evidence in the record that he gave any "instructions" per Rule 601(e)(1), R.C.M., regarding *prosecutorial* discretion and a twelve member panel. At issue then is what happened after challenges reduced the panel to six members and the Defense moved to delay the proceedings to allow additional members to

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[37]Rule 601(e)(1), RCM, expressly provides that the Convening Authority "may include proper instructions in the [referral] order." Thus, if the Convening Authority chose to delegate to the prosecutor the discretion as to whether or not to proceed with a panel consisting of *less than* twelve members in this case, he could have done so. He did not, and thus that authority remained with the Convening Authority. *Martin v. Mott*, 25 U.S. 19, at 34-35 (1827).

[38]10 U.S.C. § 825(d)(2), set out in fn. 14, *supra*. *Amicus* does not concede the constitutionality of that statute, but mindful of the Court's desire that *amici* not be duplicative, the NACDL concurs with Petitioner's arguments on that issue. We further agree with *amicus*, National Institute for Military Justice, who suggest that this case provides an optimal vehicle to resolve Article 25's constitutionality.

be detailed so as to have twelve members [R. 768-69][39]

Absent any "Referral" instructions from the Convening Authority (other than as capital), and absent any codal or regulatory prohibitions - a fact implicitly recognized by the military judge [R. 770] - what prevented the judge from at least seeking the Convening Authority's input? The answer lies in the record. The judge abdicated his role by ceding to the *prosecutor* the authority to decide the Defense motion, when he stated, "[I]f the government were to be of the mind that *they* wanted to have twelve members, I certainly wouldn't contest it." [R. 770; emphasis added]. Here the judge first ignored the plain statutory provisions of Article 40, U.C.M.J., 10 U.S.C. § 840, giving him the express authority to "grant a continuance to any party for such time, and as often, as may appear just." The military judge by deferring this crucial decision to the very person seeking Gray's death, totally abdicated his neutral and impartial role - a fact that denied Gray due process in the worst way. *See generally, Tumey v. Ohio,* 273 U.S. 510, at 523 (1927).[40]

It is unprecedented in criminal litigation, much less in a capital case, for the prosecutor to be given the choice of whether a capital defendant has a six person or a twelve person panel to decide his fate. This Court has long recognized that:

> [I]mportant constitutional guarantees come into play once the citizen - whether soldier or civilian - is charged with a capital crime . . . . The most

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[39]*See* Winthrop at 79-80, regarding "Supernumerary Members," *i.e.*, alternate members. While he notes that the practice was no longer used at the time of his treatise, such a practice here would have avoided this issue.

[40]*Compare, United States v. Ramos,* 42 M.J. 392 (1995), and cases cited therein on judicial impartiality.

> significant of these is the right to a trial by jury, one of the most important safeguards against tyranny which our law has designed. *Lee v. Madigan,* 358 U.S. 228, at 234 (1959).

Furthermore, albeit in another context, the Court has observed that one of the fundamental purposes of a jury trial (or court-martial panel) was to provide a safeguard against an "overzealous prosecutor." *Duncan v. Louisiana,* 391 U.S. 145, at 156 (1968). Regardless of this Court's disposition of the other issues herein, *amicus* urges this Court to resolve this issue - it is constitutionally impermissible under Fifth Amendment due process principles and Eighth Amendment concepts of arbitrariness. *Furman v. Georgia, supra.* The process here of allowing the prosecutor[41] by mere objection to simply block the accused's efforts to have the Convening Authority, the person legally charged with "detailing" court members, appoint twelve members *in a capital case*, not only reflects an abdication of judicial responsibility, but is an arbitrary perversion of our Constitutional system. It cannot stand in a civilized society - civilian or military - as the key to life or death for Ronald Gray.

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[41]This is not an issue of traditional prosecutorial discretion. *Compare, Oyler v. Boles,* 368 U.S. 448 (1962).

CONCLUSIONS

Justice Harlan once observed:

> So far as capital cases are concerned, I think they stand on quite a different footing than other offenses. In such cases the law is especially sensitive to demands for . . . procedural fairness which inheres in a civilian trial . . . . I do not concede that whatever process is "due" an offender faced with a fine or a prison sentence necessarily satisfies the requirements of the Constitution in a capital case. The distinction is by no means novel . . . nor is it negligible, being literally that between life and death. *Reid v. Covert,* 354 U.S. 1, at 77 (1957) [Harlan, J., concurring].

This case is about fundamental fairness to a citizen-soldier who faces death, not from combat, but from a courtroom. *Amicus Curiae* respectfully urges this Court to grant *certiorari* to consider the fundamental due process issues involved with the size of Petitioner's jury - half that of civilian defendants similarly situated, and half that of two other *military* capital defendants.[42] The issue is preserved, systemic and unlikely to percolate in any other Court of Appeals.

Even more compelling and in need of guidance from this Court are the Eighth Amendment, arbitrariness issues created by a judge who breached his judicial role and allowed the *prosecutor* to interfere with Petitioner's *statutory* right to have the Convening Authority select the size of his court-martial panel. In an adversarial criminal justice system, which our

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[42]Due process also encompasses "equal protection" concepts, *Bolling v. Sharpe,* 347 U.S. 497 (1954), an issue specifically raised by Gray at trial [R. 768].

courts-martial practice surely is, to allow one of the litigants the arbitrary power to control the size of the forum adjudicating Petitioner's life or death, is a miscarriage of justice of Constitutional dimensions.

Justice Black observed some years ago that:

> Perhaps no group in the Nation has remained truer [to the Constitution] than military men themselves. Unlike the soldiers of many other nations, they have been content to perform their military duties in defense of the Nation in every period of need and to perform those duties well without attempting to usurp power which is not theirs under our system of constitutional government. *Reid v. Covert, supra* at 40.

NACDL as *amicus curiae* respectfully urges this Court to grant *certiorari* on Petitioner's issues to insure that all citizens - civilians, Soldiers, Sailors, Airmen and Marines, do not suffer death from the Government in disparate fashions.

Respectfully submitted,

DONALD G. REHKOPF, JR.
(Counsel of Record)
BRENNA & BRENNA
31 East Main Street, Suite 2000
Rochester, New York 14614
(716) 454-2000

Attorneys for National Association of Criminal Defense Lawyers

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(6)

No. 00-607

In the Supreme Court of the United States

RONALD A. GRAY, SPECIALIST FOUR
United States Army, Petitioner,

v.

THE UNITED STATES OF AMERICA, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES (CAPITAL CASE)

REPLY TO BRIEF IN OPPOSITION

THOMAS H. DUNN
Florida Bar No. 871753
303 Elizabeth Street, NE
Atlanta, Georgia 30307
(404) 222-9202

ADELE H. ODEGARD
Colonel, U.S. Army Judge Advocate
Advocate General's Corps
U.S. Army Legal Services Agency
Defense Appellate Division
901 N. Stuart Street
Arlington, VA 22203
(703) 588-5286
Counsel of Record

BLAIR T. O'CONNOR
Captain, U.S Army Judge
Advocate General's Corps

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QUESTIONS PRESENTED

I

During peacetime, do the Fifth, Sixth and Eighth Amendments permit a member of the Armed Forces to be convicted and sentenced to death by a court-martial panel of less than twelve members when there is no fixed panel size?

II

During peacetime, does the convening authority's power to hand-pick military subordinates, whose careers he can directly and immediately effect and control, to serve as court members in a capital court-martial violate the Fifth, Sixth, and Eighth Amendments?

III

Can an appellate court *assume* that the trial judge made a determination as to whether the prosecutor's explanation was credible or pretextual pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986), without conducting a further hearing on the issue, when the trial judge ruled on petitioner's *Batson* claim before the prosecutor provided a race-neutral explanation for the challenge?

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v.

THE UNITED STATES OF AMERICA, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES (CAPITAL CASE)

REPLY TO BRIEF IN OPPOSITION

Petitioner, Ronald A. Gray, files the following reply to the United States' brief in opposition to his petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Armed Forces affirming his conviction and sentence to death.

I

STATEMENT OF THE CASE

Respondent is correct in stating that immediately after defense counsel objected to the government's peremptory challenge on grounds of *Batson v. Kentucky*, 476 U.S. 79 (1986), the military judge "noted that the defense itself had earlier sought to strike Major Quander for cause." (Resp. 4). Respondent fails to inform this Court, however, that the military judge's recollection was incorrect. The record clearly reflects that neither side

challenged Major Quander for cause. (R. at 586). Therefore, petitioner has in no way waived the *Batson* issue.

II

THE FIFTH AND EIGHTH AMENDMENTS DEMAND THAT SERVICEMEMBERS IN CAPITAL CASES ARE AFFORDED FAIR, IMPARTIAL, AND RELIABLE TRIBUNALS.

Respondent's brief (Resp. 9) suggests that, because there may be no right to trial by jury in the military grounded in the Sixth Amendment, there are no errors of constitutional dimension in petitioner's case. This conclusion is incorrect. Respondent misstates the context of this Court's precedents on jury composition in capital cases. In *Morgan v. Illinois*, 504 U.S. 719 (1992), this Court held that when the government chooses to have juries take on the responsibility of imposing death sentences, that Due Process and Sixth Amendment guarantees apply. As this Court in *Morgan* stated, "due process alone has long demanded that, if a jury is to be provided the defendant, regardless of whether the Sixth Amendment requires it, the jury must stand impartial and indifferent to the extent commanded by the Sixth Amendment." 504 U.S. at 727.[1]

Petitioner acknowledges a court-martial panel is not a jury, and that this Court has previously held that courts-martial are

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[1] Indeed, at the time this Court rendered its opinion in *Ex parte Quirin* 317 U.S. 1 (1942), which discusses the right to a jury trial for members of the military, the governing law for soldiers was the Articles of War. The Articles of War prohibited trial by courts-martial for murder committed in the United States during times of peace. *See Loving v. United States*, 517 U.S. 748, 752-54 (1996) (outlining the history of courts-martial jurisdiction for capital offenses). Historically, a case such as petitioner's might not have been tried by court-martial at all, but rather likely would have been tried in a civilian court.

not subject to the jury trial requirements of the Sixth Amendment. Nevertheless, the Fifth and Eighth Amendments demand that all servicemembers charged with capital offenses have their cases heard by a fair, impartial, and reliable tribunal. *See Irvin v. Dowd*, 366 U.S. 717, 721-22 (1960) ("A fair trial in a fair tribunal is a basic requirement of due process."); *Turner v. Louisiana*, 379 U.S. 466 (1965); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). Just as a sentence to death by a five-person jury in a civilian case would unquestionably violate the Constitution, *see Ballew v. Georgia*, 435 U.S. 223, 245 (1978), a sentence to death by a court-martial panel of five members seriously calls into question the fairness, impartiality and reliability of the verdict. The fact that the size of the panel that heard petitioner's case was a mere six members in no way diminishes the potential for unfairness, partiality, or unreliability of the tribunal's verdict and sentence. The right of all servicemembers to a fair and impartial tribunal should comport with the constitutional protections guaranteed to all citizens. *See generally Loving*, 517 U.S. at 774 (Stevens, J., concurring).

A. The UCMJ Mandates Trial by Jury in Capital Cases

To counter petitioner's assertion that a military jury of fewer than twelve members may not constitutionally sentence a servicemember to death, respondent points out that nine states require death sentences to be imposed by judges. (Resp. 10-11). Respondent's brief, however, fails to consider that a servicemember in a capital cases must be sentenced by a court-martial panel. Unlike defendants charged with capital offenses in state and federal district courts, and even unlike servicemembers in non-capital cases, the petitioner in this case had neither the right nor the option to have his sentence determined by a judge. Article 18 of the Uniform Code of Military Justice (UCMJ) provides that a general court-martial composed of a military judge alone (that is, a court-martial in which there is no panel) "shall not have jurisdiction to try any person for any offense for which the death penalty may be adjudged unless the case has been previously referred to trial as a noncapital case." Article 18, UCMJ, 10

U.S.C. § 818.[2]

B. Due Process Mandates a Fair, Impartial, and Reliable Verdict as to Both Findings and Sentence

Contrary to respondent's assertion (Resp. 10 n.2) that "petitioner does not claim that the panel was too small to find him guilty, but only to sentence him to death," the Petition for a Writ of Certiorari clearly points out that servicemembers are the only capital defendants in this country whose guilt or innocence is not decided by a twelve-member jury. (Pet. 9). Furthermore, in consideration of the fact that a unanimous verdict to a death-eligible offense is one of the prerequisites to sentencing a servicemember to death, such that it only takes a single vote to prevent death from being imposed at the guilt or innocence stage, petitioner most definitely contests the fairness and reliability of being found guilty by a six-member tribunal, when all civilians have their guilt or innocence determined by twelve-person juries. *See Morgan*, 504 U.S. at 727; *Irvin*, 366 U.S. at 722; *Turner*, 379 U.S. at 471-72.

C. There is a Societal Consensus for Twelve-Person Juries in Capital Cases

Respondent's conclusion there is "no societal consensus that imposition of a death sentence requires the unanimous decision of 12 individuals" (Resp. at 10) is incorrect. As this Court noted more than thirty years ago, "[i]n capital cases . . . it appears that no State provides for less than 12 jurors – a fact that suggests implicit recognition of the value of the larger body as a

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[2] The fact that a military member in a death penalty case must be tried and sentenced by a court-martial panel rather than by a judge makes the process for selecting panels critically important to the protection of servicemembers' rights under the Fifth, Sixth, and Eighth Amendments. Petitioner asserts that the statutory requirement that panels alone can impose courts-martial death sentences requires the practices relating to the selection and qualification of court-martial panels to be subject not to judicial deference, but rather a searching judicial scrutiny.

means of legitimating society's decision to impose the death penalty." *Williams v. Florida*, 399 U.S. 78, 103 (1970). It is clear, then, there is indeed a societal consensus that only twelve-person juries or judges shall have the power to impose a sentence to death. The only capital jurisdiction in the United States operating contrary to this consensus is the military, which, although requiring a tribunal of panel members, does not mandate a specific number of members beyond the minimum number of five.

D. There is No Legitimate Government Interest Against a Twelve-Member Tribunal

Respondent suggests that requiring capital court-martial cases to have panels of twelve would detract from the "essential function of the military," which is to train for war and to fight wars if necessary. (Resp. 11). Such a suggestion is without merit, however, in a court-martial held during peacetime, as was petitioner's case. Petitioner's conclusion treats courts-martial as mere distractions from the military's mission. Congress has vested in commanders responsibility for enforcing military discipline, and has provided the court-martial system set forth in the Uniform Code of Military Justice (10 U.S.C. § 801 et seq.) as one of the tools commanders have for that purpose. However, the UCMJ is silent on the issue of how many persons should sit as members in capital courts-martial, instead leaving this decision in the hands of the commanders who are the convening authorities for each case[3].

In petitioner's case the convening authority initially detailed fifteen people to serve as panel members. Presumably then, when the convening authority decided to seek the death penalty by referring the petitioner's case to trial as a capital case, he also determined fifteen soldiers could, as the respondent puts it,

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[3] Indeed, the arbitrariness of the convening authority's ability to decide how many persons to detail to any given case is mentioned in the Petition for a Writ of Certiorari as evidence that this process violates the Eighth Amendment's guarantee against cruel and unusual punishment. (Pet. 15-16)

be "diverted" from their military duties to serve as panel members. Through the exercise of challenges this number was reduced by nine, to the six members who ultimately heard petitioner's case and sentenced him to death. (R. at 767). Those who were excused as a result of the challenge process were released to return to their regular military duties (*See e.g.* R. at 528), which indicates the convening authority had fewer persons diverted from duty than he presumably anticipated when he selected the original members.

The military judge refused defense counsel's request to delay the trial in order to allow the convening authority to select additional members in order to ensure a panel of twelve. (R. at 767-69). Furthermore, the military judge refused, at the prosecutor's behest, to transmit the request to the convening authority to enable him to make a determination as to whether to detail additional members. The military judge's denial of petitioner's request for a twelve-person tribunal thwarted the convening authority's discretion to determine how many members should have heard petitioner's case.

Although there may have been a time, as respondent asserts (Resp. 11), when Congress' determination to provide convening authorities with the discretion to convene courts-martial with fewer than twelve members may have been a reasonable one, this is certainly not the case today, when our Armed Forces have an authorized strength of over 1,385,000 personnel. See Nat'l Def. Auth. Act for Fiscal Year 2000, Pub. L. No. 106-65, § 401, 113 Stat. 512, 585 (1999). Furthermore, when the punishment may be death, such a determination is entirely unreasonable. Clearly, providing petitioner with a twelve-member court-martial panel would have in no way posed any threat to our nation's security.[4]

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[4] At the time of petitioner's court-martial, more than 40,000 soldiers were stationed at Fort Bragg, North Carolina, the site of petitioner's trial. The vast majority of these soldiers would have been available for court-martial duty. *See* http://www.bragg.army.mil/history/HistoryPage/History%20of%20Fort%20Bragg/FortBragginthe1980s.htm for a description of Fort Bragg in the 1980s, the time of petitioner's trial.

This Court should grant review of petitioner's case to determine the fairness, impartiality, and reliability of capital trials heard by a tribunal comprised of fewer than twelve lay persons because, "when the punishment may be death, there are particular reasons to ensure that the men and women of the Armed Forces do not by reason of serving their country receive less protection than the Constitution provides for civilians." *Loving*, 517 U.S. 774 (Stevens, J., concurring).

III

THE LACK OF A FIXED PANEL SIZE ISSUE WAS NOT FORFEITED.

Contrary to respondent's assertion (R. at 12), the petitioner did raise the issue of the lack of fixed panel in a petition for reconsideration to the Court of Appeals for the Armed Forces (CAAF), which denied relief. (*See* Second Petition for Reconsideration, filed Apr. 18, 2000). Under CAAF's Rules of Practice and Procedure, a second petition for reconsideration will not be filed unless accompanied by a motion for leave to file and unless such motion is granted by the Court. (*See* Rules 30 and 31, Rules of Practice and Procedure, Court of Appeals for the Armed Forces, Feb. 27, 1996). Petitioner complied with the CAAF Rules and the Court granted the petitioner's motion for leave to file a second petition for reconsideration. Thus, the issue regarding the lack of a fixed panel in petitioner's case was properly raised to the appropriate court, which considered and rejected it.

IV

CONGRESSIONAL ACTION WOULD NOT MOOT THE ISSUE OF THE CONVENING AUTHORITY'S SELECTION OF THE PANEL MEMBERS IN PETITIONER'S CASE.

Respondent suggests that because Congress has

considered changing the present method of selecting court-martial members, this Court's review of this issue is not appropriate due to the possibility of mootness. This argument misses the mark. Petitioner is under a sentence to death. Therefore, any possibility of congressional action on this issue would be of little comfort to petitioner, who was convicted and sentenced to death by a court-martial panel hand picked by the convening authority, pursuant to the existing system for selection of members.[5]

V

BATSON ISSUES REGARDING A TRIAL JUDGE'S DETERMINATION OF WHETHER THE DEFENDANT HAS ESTABLISHED PURPOSEFUL DISCRIMINATION CONTINUE TO PLAGUE MILITARY APPELLATE COURTS.

Contrary to respondent's contention that the *Batson/Moore*[6] issue raised in petitioner's case is of "no continuing importance[7]," military courts still struggle with issues relating to peremptory challenges of women and minority group members. In particular, the sufficiency of military judges' findings regarding whether the government has met its burden to rebut a prima facie case of purposeful discrimination, a judicial

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[5] The possibility of Congressional reform in this area would also be of little comfort to the other five servicemembers who were sent to the military's death row by panel members personally selected by their convening authorities.

[6] *Batson v. Kentucky*, 476 U.S. 79 (1986); *United States v. Moore*, 28 M.J. 366 (C.M.A. 1989). As respondent recognizes, in *Moore* the Court of Military Appeals applied *Batson* to the military, and prescribed specific procedures for dealing with peremptory challenges of minority group members.

[7] The *Batson* issue was of considerable significance to the two dissenting CAAF judges, who held that the military judge prejudiced petitioner's constitutional rights by failing to apply this Court's clear precedent in *Batson*. (*See* Pet. App. 145a-59a).

responsibility emphasized by this Court in *Batson*, has been called into question again and again. *See, e.g., United States v. Tulloch*, 47 M.J. 283 (1997); *United States v. Ruiz*, 49 M.J. 340 (1998); *United States v. Hurn*, 52 M.J. 629 (N-M.C. Ct. Crim. App. 1999), *pet. granted*, 54 M.J. 278 (2000); *United States v. Robinson*, 53 M.J. 749 (Army Ct. Crim. App. 2000).

Furthermore, to the extent respondent's brief attempts to frame the *Batson* issue as whether the government's race-neutral explanation for its challenge of Major Quander was both timely and sufficient, it misconstrues petitioner's claim. Petitioner has not asserted that the government failed to comply with the second step of the *Batson* inquiry, but rather that the military judge completely failed to comply with Batson's third step of assessing the persuasiveness of the prosecution's race-neutral explanation in determining whether the defense had established purposeful discrimination. *See Batson*, 476 U.S. at 98; *Purkett v. Elem*, 514 U.S. 765, 768 (1995). This Court has specifically assigned to the trial judge the responsibility of determining whether a prosecutor's race-neutral explanation for a *Batson* challenge is not pretextual. *See Hernandez v. New York*, 500 U.S. 352, 365 (1991). In *United States v. Santiago-Davila*, 26 M.J. 380, 390 (C.M.A. 1989), the CAAF held that *Batson*'s three-step inquiry for resolving peremptory challenges of minority groups members were applicable to the military retroactively. Nevertheless, in petitioner's case, which was tried almost two years after the *Batson* decision, the trial judge failed to follow the *Batson* inquiry, because he wrongly believed *Batson* did not apply.

Batson and its progeny clearly establish that it is the trial judge who presides over the voir dire process who is in the best position to observe the demeanor and appearance of the jurors and counsel. This is why the critical determination of purposeful discrimination at the third *Batson* step must be made by the trial judge, not an appellate court eleven years after the fact. Respondent's argument that the military judge made an "implied ruling" that the prosecutor offered a legitimate race-neutral explanation for his challenge of Major Quander, adopted from the CAAF's majority opinion, misapplies the *Batson* inquiry. *Batson* simply does not provide for an appellate court to substitute its

own judgment regarding the genuineness of a prosecutor's race-neutral explanation for a peremptory challenge, based on a cold record and an unsworn, self-serving statement by the prosecutor, for that of the trial judge who presided over the jury's voir dire more than ten years ago. *See e.g. Jordan v. Lefevre*, 206 F.3d 196, 200 (2d Cir. 2000) (holding a trial judge's denial of a *Batson* motion without explicitly adjudicating the credibility of challenging party's race-neutral explanation to be constitutional error).

CONCLUSION

This Court should grant review of the issues raised in the Petition for a Writ of Certiorari.

Respectfully submitted,

ADELE H. ODEGARD
Colonel, Judge Advocate
General's Corps (JA)
Defense Appellate Division
901 N. Stuart Street, Suite 340
Arlington, VA 22203
(703) 588-5281
Counsel of Record

THOMAS H. DUNN
Florida Bar No. 871753
303 Elizabeth Street, N.E.
Atlanta, GA 30307
(404) 222-9202

BLAIR T. O'CONNOR
Captain, Judge Advocate
General's Corps